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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE SPERRY AND HUTCHINSON COMPANY

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 29, 1970.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 432 F. 2d 146. The opinion of the Federal Trade Commission (App. 61a-129a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1970 (App. 20a). On December 22, 1970, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including January 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 5 of the Federal Trade Commission Act, which directs the Commission to prevent "unfair methods of competition * * * and unfair or deceptive acts or practices," is limited to conduct which violates the letter or spirit of the antitrust laws.

2. Whether decisions under state law in private litigation holding that commercial restraints which the Commission seeks to prevent are lawful, foreclose the Commission from declaring such restraints to be unfair within the meaning of Section 5.

STATUTE INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 717, 719, as amended, 15 U.S.C. 45(a), provides in part:

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Section 5(c) of the Act provides in part:

Any person, partnership or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used, or where such person, partnership,

or corporation resides or carries on business * * *

STATEMENT

The court below set aside part of an order of the Federal Trade Commission which prohibited the Sperry and Hutchinson Co. ("S&H"), the nation's largest trading stamp company, from enforcing certain restrictions on the sale or exchange of its stamps by members of the consuming public. S&H Green Stamps, like other trading stamps, are purchased by retailers who issue them to consumers in proportion to their purchases. The stamps, when collected in sufficient amounts and pasted in books, may be redeemed ordinarily for merchandise, at stamp company redemption centers.

In November 1965, the Commission charged S&H in a three-count complaint with violations of Section 5 of the Federal Trade Commission Act. Count III, which is at issue here,¹ challenged the practice of S&H, individually and in combination with others, of suppressing free and open redemption and exchange of trading stamps. The Commission sustained the complaint and issued a cease and desist order. The court of appeals held that the Commission had exceeded its authority with respect to Count III and set aside that part of the order dealing with the restriction of free and open redemption and exchange.

¹ Counts I and II dealt with S&H's individual and collective action to prohibit retailers who dispense S&H stamps from giving more than one stamp for each ten cent purchase. The Commission held against S&H on those counts, but S&H abandoned its challenge on these issues in the court of appeals.

THE TRADING STAMP INDUSTRY

Although trading stamps have been used since the turn of the century, they did not achieve a significant role in retailing until after 1950 (App. 24a). In 1964, approximately 400 billion trading stamps were issued by more than 200,000 retail establishments, licensed by the various stamp companies, in connection with the sale of about 40 billion dollars in goods and services.² The cost of the stamps to retailers was about \$800 million (*ibid.*).

The trading stamp industry is highly concentrated. Although there may be as many as 400 companies engaged in the business, most are very small. In 1964, the six leading companies accounted for between 83 and 88 percent of the trading stamp volume in the country. S&H, nearly three times the size of its nearest rival, accounted for about 38 to 40 percent of the business (App. 30a-31a, 36a).

S&H charges its "licensed" retailers approximately \$2.70 for 1200 stamps, which fill one savings book. When consumers have at least one full book, they may redeem stamps for merchandise at redemption centers which S&H maintains throughout the country (App. 25a, 27a).³

² Stamps are most frequently issued in connection with sales of food. In 1962, stamps were issued in connection with 47 percent of all food sales. In some urban markets the percentage was much higher (App. 23a, 31a). About 62 percent of S&H stamps are dispensed by food stores and about 21 percent by gasoline stations (App. 26a-27a).

³ Sixteen states require that the stamp saver be given an option to redeem in cash, and two require redemption in cash only. Kansas prohibits the issuance of stamps in connection with sales of merchandise and Washington imposes a heavy tax on merchants who use stamps redeemable in merchandise (App. 27a-28a).

REDEMPTION AND EXCHANGE

S&H limits redemption of its stamps to its redemption centers. S&H's contract with its licensees provides that title to the stamps shall remain in S&H.⁴ A notice on the inside cover of the savings books states that the stamps may be redeemed only at an S&H redemption center and may be exchanged only with other "bona fide" collectors after having obtained S&H's permission (App. 27a, 29a-30a).

Not all stamps are redeemed. Of the stamps issued by S&H between 1914 and 1964, 156 billion, or about 14 percent, remained outstanding at the end of 1964. The Commission estimated that between 86 and 95 percent of stamps issued ultimately will be redeemed (App. 28a-29a, 65a-66a).

About 60 percent of all American households save S&H Green Stamps (App. 34a). But most consumers accumulate a variety of different brands of stamps either because the different stamp-dispensing retailers they patronize do not issue the same brand, or because they accumulate stamps of one brand in one part of the country and then move to another in which that brand is not offered (App. 112a; J.A. I, 73; J.A. II, 469; J.A. III, 12-14, 54-64, 73-74, 79-80 89-90 113 158-160).⁵

The stamp saver, having accumulated different brands, may wish for a variety of reasons to exchange

⁴ The company does not, however, pay taxes on stamps in the hands of its licensees, nor does it replace stamps stolen from them (App. 111a).

⁵ "J.A." refers to the three-volume joint appendix before the court of appeals, containing, *inter alia*, the findings of the examiner and excerpts of testimony. We are filing it with the Clerk.

one brand for another.⁶ Trading stamp exchanges are independent small businesses which buy and sell different stamps and exchange them; they thus provide a means by which consumers may, for a fee, consolidate or exchange their stamps (App. 103a-104a, J.A. III, 13-15, 101-102, 121, 126, 152-154). Various retailers also have offered to exchange their merchandise for trading stamps in an attempt to attract customers (App. 104a-105a).

S&H has consistently sought to eliminate the activities of trading stamp exchange operators and the redemption and exchange of trading stamps by retailers, usually by threatened legal action or actual suit. In the eight-year period between 1957 and 1965, for example, S&H filed 16 complaints, issued 140 warning letters to stamp exchanges and 175 warnings to persons redeeming S&H stamps (App. 43a-44a).

THE PROCEEDINGS BELOW

S&H's basic justification, advanced in various suits under state laws as well as in this case, for seeking to thwart free and open exchange and redemption of stamps is that restriction is necessary to its business. It has argued that if stamps may be obtained at an exchange, consumers will have no incentive to patron-

⁶ A housewife may wish, for example, to consolidate her stamps into one type so that she can obtain a major item of merchandise (J.A. III, 93). She may find that only one stamp company offers a certain brand or product (J.A. III, 56-57). Or she may find that she can obtain the same item from one stamp concern with fewer stamps than from another (J.A. III, 56, 101-103). She may be closer to the redemption center of one company (J.A. III, 14-15, 50, 101-103) or have moved to an area in which stamps she has saved are not offered (J.A. III, 61, 365-366).

ize S&H retailers which issue stamps initially. Consequently, retailers will no longer desire to use S&H stamps as a promotional device. Redemption at other than an S&H center will deprive the company, it contends, of the "remembrance value" of having the customer obtain and enjoy a product through S&H, which will induce him to continue saving S&H stamps (App. 106a-107a).

The courts have frequently held that S&H's restrictions on exchange and redemption are lawful under state laws. *E.g., Rance v. Sperry & Hutchinson Co.*, 410 P. 2d 859 (Okla.), certiorari denied, 382 U.S. 945. The hearing examiner, partly in reliance on such decisions, concluded that S&H's unilateral action to suppress stamp exchanges and redemption by retailers did not violate Section 5.¹

The Commission rejected the examiner's decision, ruling that S&H's systematic enforcement of the restrictions, whether separately or collectively, was unlawful. It described its responsibility under the Act as "simply to determine, in light of the public interest, whether or not the practices * * * are unfair within the meaning of Section 5" (App. 77a). It expressly rejected "respondent's contention" that there can be no violation of the Act "without a showing of such anticompetitive effects as would be required under the antitrust laws" (App. 79a).

The Commission held that there was "no business justification for the restraint imposed" on stamp trading by S&H (App. 109a). It pointed out that there

¹ The examiner held that the collective action by S&H and other trading stamp companies was unlawful.

was no concrete evidence to substantiate the company's general assertions of business necessity. It further found that, prior to suppression of exchanges in the Oklahoma-Texas area—perhaps the only place exchanges had operated for a long enough period to permit even a tentative evaluation—S&H's business actually had seemed to increase. Moreover, it observed that stamps were frequently exchanged privately or pooled for charitable purposes without adverse effect on the company.*

The Commission also ruled that even a showing of good business reason for S&H's practices would not have overcome "their possible harm to competition" (App. 109a). The Commission found that S&H's actions "tended to eliminate the operations of a whole class of businessmen who provided * * * a useful and valuable function" (App. 114a). The suppression, which was enhanced by the company's dominance in the stamp industry, thus "disadvantaged the stamp collecting consumers who did not have, after respondent's actions, the same freedom of choice in the disposition of trading stamps" (App. 112a). With respect to retailers who offered to redeem or exchange S&H stamps for merchandise or for their own brands of stamps, the Commission found that S&H's actions unjustifiably "restrained * * * a practical and effective response to stamp competition in their markets" (App. 114a).

The Commission ordered S&H, among other things, to cease "[a]ttempting in any way to * * * suppress

* In 1960, 20 percent of all stamps savers traded with other collectors, mostly unauthorized (App. 30a).

or prevent the free and open redemption or exchange of trading stamps" by court suits or otherwise (App. 53a).^{*}

The court of appeals, dividing 2-1, set aside the part of the order dealing with suppression of exchange and redemption of stamps. It held that the Commission had exceeded its statutory authority, which it defined as limited to declaring "unfair" acts which are either "(1) a per se violation of antitrust policy; (2) a violation of the letter of * * * [the antitrust laws]; or (3) a violation of the spirit of these [laws] * * * as recognized by the Supreme Court of the United States" (App. 6a-7a). For there to be a violation of the "spirit" of the antitrust laws, it continued, the allegedly illegal practice must be one which when "full blown" would violate the antitrust laws or have the characteristics of an antitrust violation (App. 8a).

The court, stressing decisions under state law which "time and time again" had upheld S&H's suppression practices, concluded there was no violation of the letter or spirit of the antitrust laws. (App. 10a). In fact, it added its view that the Commission order would restrain competition between S&H and other stamp companies (App. 8a).

Judge Wisdom, dissenting, argued that Section 5 empowers the Commission to act "whenever it uncovers [trade] practices which are undesirable or inimical to the public interest" (App. 14a). Reviewing

^{*} The order was expressly made inapplicable to any practice relating to the "reissuance" of S&H stamps. Thus, S&H was not foreclosed from preventing a nonlicensed retailer from acquiring S&H stamps and redispensing them with the sale of goods or services (App. 54a, 118a).

the legislative history of the Act, as well as the pronouncements of this Court, he concluded that "the Commission did exactly what Congress intended it to do—that is, decide whether S&H's practices were unfair on the facts before it in the light of the public interest" (App. 18a). Judge Wisdom found that the record supported the Commission's finding "that S&H's suppressive activities have a detrimental effect on consumers and on competition" and that "[t]hese effects outweigh the damage to * * * [S&H] that will be caused by the Commission's order" (App. 19a).

REASONS FOR GRANTING THE WRIT

1. The court of appeals' ruling that the Commission's authority under Section 5 of the Federal Trade Commission Act is limited to prohibiting practices that violate the antitrust laws or their spirit or policy constitutes a serious and unwarranted curtailment of the agency's broad power to act against all practices that may reasonably be deemed "unfair" or "deceptive." The principle the court announced and applied is not limited to cases involving competitive practices, but more broadly covers the Commission's basic authority under Section 5. The court prefaced its itemization of the practices the Commission may prohibit with the statement: "To be the type of practice that the Commission has the power to declare 'unfair' the act complained of must fall within one of the following types of violation * * *" (App. 6a). Moreover, as shown above (pp. 5-6, 8) and as discussed below (pp. 12-13), the Commission's decision was concerned not only with the impact of S & H's practices upon

competition by stamp exchanges and retailers but equally with the serious adverse affect of those practices upon consumers. Indeed, the court's narrow view of the Commission's powers appears to be a return to the doctrine of *Federal Trade Commission v. Gratz*, 253 U.S. 421, which has since been expressly rejected. *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 320-321.

The Commission, of course, has broad power under Section 5 to give content to the term "unfair practices," *Federal Trade Commission v. Brown Shoe Co.*, *supra*; *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367; *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394. The Commission's jurisdiction is not limited to preventing practices which are actual anti-trust violations or have the characteristics of such violations. *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304.¹⁰ For, as Judge Wisdom pointed out in his dissent (App. 13a), Congress recognized when it passed the Federal Trade Commission Act that it was "impossible to frame definitions which embrace all unfair practices," since "[t]here is no limit to human inventiveness in this field" (H. Rep. No. 1142, 63d Cong., 2d Sess. 19); Congress wisely decided that it would be better 'by a general declaration [to] leave it to

¹⁰ See also *All-State Industries of North Carolina, Inc. v. Federal Trade Commission*, 423 F. 2d 423 (C.A. 4), No. 379, this Term, certiorari denied, Oct. 12, 1970; *Goldberg v. Federal Trade Commission*, 283 F. 2d 299 (C.A. 7); *Lichtenstein v. Federal Trade Commission*, 194 F. 2d 607 (C.A. 9); *Dorfman v. Federal Trade Commission*, 144 F. 2d 737, 739-740 (C.A. 8) (threatening suit to coerce payment for merchandise which was not ordered).

the Commission to determine what practices were unfair.' S. Rep. No. 597, 63 Cong. 2d Sess. (1914)."

Congress confirmed the Commission's broad responsibilities in the Wheeler-Lea Amendment to the Federal Trade Commission Act in 1938 (52 Stat. 111). The amendment added the specific proscription on "unfair or deceptive acts or practices in commerce" in order to make it clear that Section 5 protected the consumer from unfair practices whether or not they also were anticompetitive. S. Rep. 221, 75th Cong., 1st Sess. 3. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 384; *Lichtenstein v. Federal Trade Commission*, 194 F.2d 607, 609-610 (C.A. 9).

2. Under the limited scope of judicial review of Commission determinations that particular practices are unfair (*Atlantic Refining, supra*), the court of appeals should have upheld the agency's decision. Whether or not the unfair practices involved in this case are traditional violations of the antitrust laws, their ultimate harmful effect is felt by the same class, consumers, who are harmed by antitrust violations. It is the restriction of the consumer's opportunity to redeem or exchange her trading stamps that injures her; preservation of stamp exchanges and stamp redemption by retailers, which provide these services for consumers, is necessary to protect the latter. Indeed, the major purpose of the exchanges and the redemption activity of retailers is to increase the utility to consumers of their trading stamps.

The Commission recognized the critical importance of the interest of consumers and the inextricable link

between that interest and the activities of exchanges and retailers who redeem stamps. It found that S&H's suppression of those activities unfairly harmed "the persons engaged therein and the consuming public" (App. 51a).¹¹ There is ample support in the evidence for this finding. Testimony of various housewives and stamp exchange operators indicated both the reasons why most consumers collect more than one variety of stamps and the numerous factors which make it important for them to be able to exchange some type for others or to redeem for something other than what is available at a particular redemption center (see *supra*, n. 6).

3. The Commission's broadly creative responsibilities under Section 5 are not restricted by state or common law of unfair competition. *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310; *Peerless Products, Inc. v. Federal Trade Commission*, 284 F.2d 825 (C.A. 7), certiorari denied, 365 U.S. 841. The court below relied heavily on decisions under state law in which S&H obtained injunctions against stamp exchanges on theories of "misappropriation of goodwill" or "tortious interference with business relations." See e.g., *Rance v. Sperry & Hutchinson Co.*, 410 P. 2d 859 (Okla.), certiorari denied, 382 U.S. 945. By its emphasis on these decisions, the court appears to have rejected, or at least substantially limited, the Commis-

¹¹ Although the Commission made its own findings in lieu of those of the examiner, its opinion, in discussing the effects of the suppression activity, specifically refers to the examiner's findings with respect to the disadvantage at which consumers are placed by virtue of the restrictions on exchange and redemption. (App. 112a).

sion's exercise of its power when its action conflicts with state policy.

It has long been recognized that federal regulatory authority is not necessarily bound by inconsistent state law. See, e.g., *Campbell v. Hussey*, 368 U.S. 297; *Schwabacher v. United States*, 334 U.S. 182; cf. *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234; *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225. State policy may, of course, be a factor to be considered along with other aspects of the public interest in reaching a decision under Section 5. Cf. *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission*, 263 F.2d 502, 512 (C.A. 4). In this case, the Commission balanced state policies and the claims of business justification underlying them against the injury to competitors and to consumers whose interests were not directly represented in private state litigation. It concluded that S&H's business justifications for suppression—and with them the state policies—were not sufficient to overcome the need for free and open redemption and exchange of trading stamps.

The record supports the Commission's conclusion. The evidence indicated that S&H would suffer no serious harm from free and open redemption and exchange and, as the Commission's opinion points out, S&H adduced no concrete evidence to the contrary. (App. 108a). It was, moreover, "clear" to the Commission "upon a more general basis that respondent's business would not be seriously affected" (*ibid.*).¹² It

¹² There is one conceivable disadvantage to S&H and other stamp companies of permitting free redemption and exchange: more stamps, for which they already have received payment, may be redeemed. S&H operates on the assumption that 95 per cent of its stamps will be redeemed. It theoretically passes on

pointed out that S&H stamps were "the most popular and sought after" (*ibid.*), presumably because of such factors as better redemption values and the national character of S&H's operation.

There is no reason to believe that this popularity would not continue, or even increase, if the stamps were freely exchangeable, or that consumers would no longer have a strong or increased incentive to obtain them. Similarly, S&H stamps would be the most in demand and presumably the most expensive at stamp exchanges.¹³ Indeed, as Judge Wisdom suggested (App. 12a), the practical effect of elimination of restrictions on exchange and redemption probably would be to sharpen competition among stamp companies. If stamps may be freely exchanged or re-

the value of the five percent of unredeemed stamps to the purchasing retailers and redeeming consumer. (J.A. III, 295-296). But the record shows, and the Commission found, that a greater percentage of stamps are not redeemed, perhaps as much as 14 percent (App. 28a, 29a, 65a-66a). The revenue from sale to retailers of these stamps is profit to S&H. A greater percentage of stamps of other companies, which are local, may be unredeemed. The fact that companies may lose certain of their profit in "wasted" stamps is, of course, not relevant to a determination of whether the means by which a greater degree of redemption will occur should be prevented.

¹³ S&H appears to have consistently assumed that, at an exchange; its stamps would trade for other stamps in a one-to-one ratio. But if Green Stamps are actually in greatest demand, they will naturally bring a premium. The same factors which presently make them more valuable would operate to raise the price of Green Stamps relative to other stamps. The practice of stamp exchange operators confirms this, for they charge more to exchange various local stamps for Green Stamps than vice-versa (J.A. III, 7, 33, 114-115, 173-174).

deemed, savers will have a choice of redemption sources; this, in turn, will encourage stamp companies to supply superior redemption merchandise.

4. The court of appeals' decision restricting the power of the Commission is particularly serious because of the broad venue provision of the Federal Trade Commission Act, Section 5(c), 15 U.S.C. 45(c), which permits review in any circuit where the unfair practice was employed or the party resides or carries on business. The application of Section 5 to unfair practices that have serious adverse impact upon consumers and businessmen, even though they violate neither the letter nor spirit of the antitrust laws, is a developing subject. See, *e.g.*, Proposed Trade Regulation Rule 425, 16 CFR 425 (Proposed), 2 CCH Trade Regulation Reporter ¶ 7985 (use of negative option plans wherein members of book clubs, record clubs and the like are sent merchandise they have not requested if they fail to indicate, within a certain period of time, that they do not wish to purchase it). Most large firms today do business within the Fifth Circuit, and firms against whom the Commission enters a cease-and-desist order in such cases will naturally channel judicial review proceedings to a court that they believe has manifested an inhospitable attitude toward the Commission's authority in this area.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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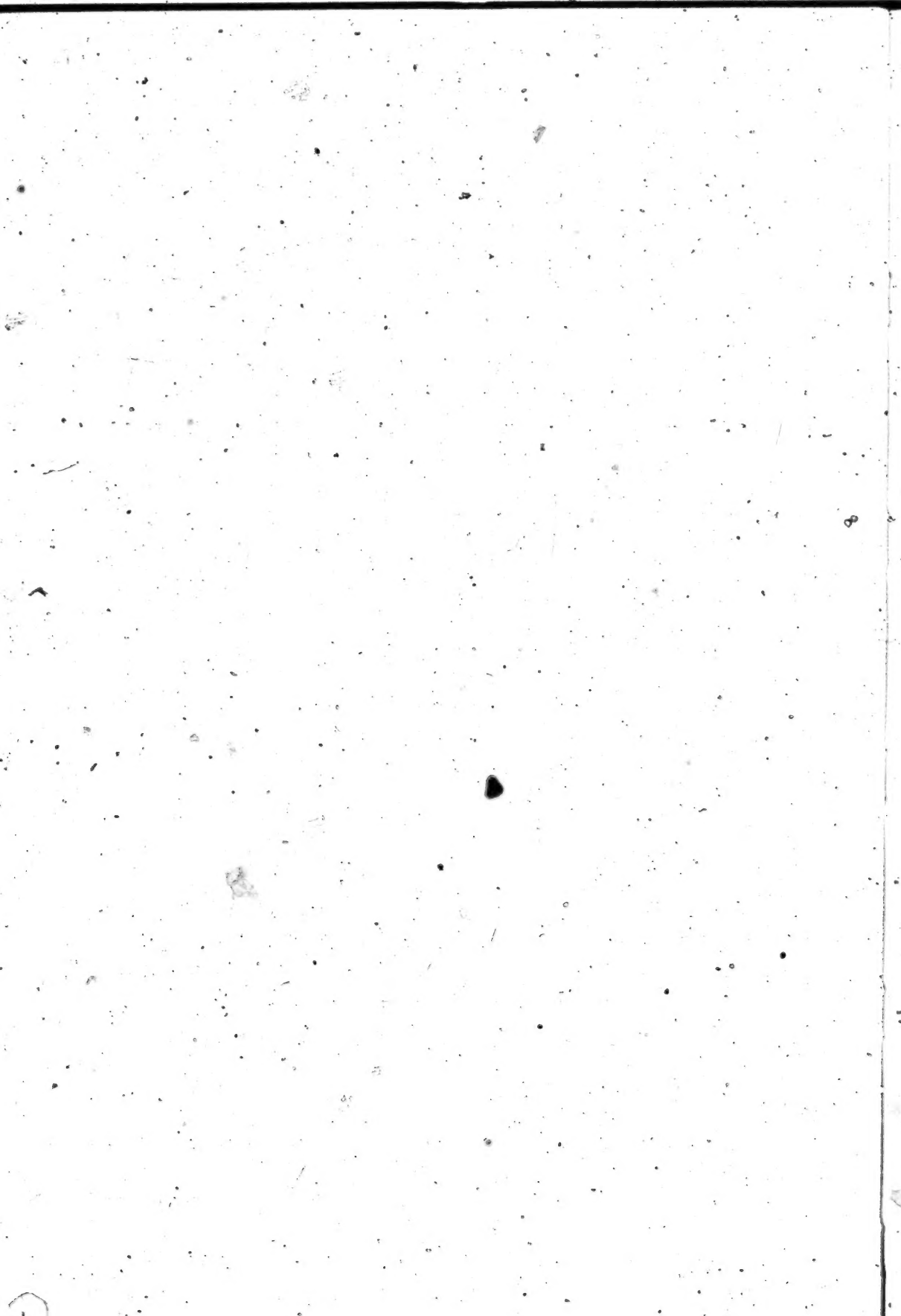
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JANUARY 1971.



APPENDIX A

In the United States Court of Appeals for the Fifth
Circuit

No. 26739

THE SPERRY AND HUTCHINSON COMPANY, PETITIONER
versus

FEDERAL TRADE COMMISSION, RESPONDENT *

*Petition for Review to Set Aside an Order of the
Federal Trade Commission (Georgia Case)*

(September 29, 1970)

Before JONES, WISDOM, and COLEMAN, Circuit Judges.

COLEMAN, Circuit Judge. The Sperry and Hutchinson Company ("S. & H.") seeks review of a cease and desist order issued by the Federal Trade Commission ("the Commission").

The litigation was initiated by a complaint, issued November 15, 1965, alleging that S. & H., in connection with its trading stamp business, engaged in unfair methods of competition and unfair acts and practices in commerce, in violation of § 5 of the Federal Trade Commission Act.¹

¹ Section 5 of the Federal Trade Commission Act, 15 U.S.C.A., § 45, provides in pertinent part:

Section 5(a)(1): "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful".

Section 5(a)(6): "The Commission is empowered and directed to prevent persons, partnerships, or corporations * * *

Upon hearing, briefs, and argument, the Hearing Examiner filed his initial decision February 10, 1967. He held that business practices of S. & H., including the prevention of trafficking in its stamps, were lawfully essential to the Company's services and that the charges relating to business practices of S. & H. acting alone were not supported by the evidence. He sustained those portions of the complaint dealing with alleged combinations or conspiracies with retailers or other trading stamp companies.

The Commission sustained the Examiner's findings as to alleged combinations and conspiracies but rejected his findings as to S. & H.'s unilateral practices. In short, the Commission sustained all of the charges in the complaint.

Portions of the order entered under Count III of the complaint directed S. & H. to cease and desist from preventing persons from trafficking in its trading stamps. S. & H. was also ordered not to institute suits to enjoin such trafficking and to notify traffickers that injunctions presently in effect in state and federal courts would not be enforced.

S. & H. urges that these portions of the order (relating to Count III) be vacated. We are of the view that the petition should be granted.

THE BUSINESS OF S. & H.

Sperry and Hutchinson is the oldest, and by far the largest, trading stamp company in the United States. It has been engaged in the trading stamp business for over seventy years. By 1964 it accounted for about 40% of all trading stamp volume in the United States.²

from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce".

² The five largest stamp companies besides S. & H. are Top Value Enterprises, Inc., issuing "Top Value" stamps, Gold Bond

Approximately 60% of all households in the Nation save S. & H. "Green" stamps. This percentage amounts to at least 35 million American families.

S. & H. issues its stamps to approximately 55,000 licensed retailers, who then dispense the stamps from over 70,000 stores throughout the Country. In 1964, S. & H. issued over 140 billion stamps to these retail licensees. The retail merchants then gave out the trading stamps in connection with sales of ten to fifteen billion dollars worth of goods and services.

S. & H. licenses the use of its trading stamp service to retailers engaged in almost every type of retail business conducted in the United States.* The licensee then issues the stamps, usually on a purchase volume basis, to those members of the public buying the particular type of goods or services offered for sale.

After filling at least one book containing 1200 stamps, a stamp saver may present them to S. & H. for redemption in merchandise. In certain states stamps may also be redeemed in cash, but during 1965 such cash redemptions represented less than 1% of the total redemptions made by S. & H. in those states.

S. & H. maintains more than 850 redemption centers located throughout the Country. Of these, approximately 750 maintain inventories of merchandise from which redemptions can be made immediately. The remainder, many of which display samples of merchandise items, accept orders which are filled within

Stamp Company, issuing "Gold Bond" stamps, E. F. McDonald Stamp Company, issuing "Plaid" stamps, King Korn Stamp Company, issuing "King Korn" stamps, and the Blue Chip Company, issuing "Blue Chip" stamps. In 1964, these companies represented between 43 and 48 percent of the stamp industry's volume.

* In 1966, S. & H.'s two leading customers were supermarkets and other food stores dispensing about 62% of S. & H.'s stamps, and gasoline stations dispensing about 21%.

a few days by one of S. & H.'s nine distribution centers.

S. & H. redemption merchandise is of high quality, is made by well known and reliable manufacturers, and is carefully selected with a view to meeting consumer desires. S. & H. goes to substantial expense to keep its redemption merchandise updated to meet current consumer demands.

The purpose of S. & H.'s service is to enable its licensees to increase and to maintain their sales by attracting customers and inducing those customers to return, again and again, until they have collected enough stamps to secure the redemption articles of their choice.

THE TRAFFICKERS IN STAMPS

Trading stamp exchanges are businesses which, for a fee, will exchange the stamps issued by one company for those issued by another. Some retailers have attempted to acquire S. & H. stamps from some source other than S. & H. in order to issue them to their own customers. Some have offered to exchange S. & H. stamps for the stamps they were issuing or to accept S. & H. stamps in partial payment for their own goods or services. These retailers and the stamp exchanges are traffickers in S. & H. stamps.

Trading stamp exchanges also purchase and sell various trading stamps outright. The purchase of stamps from exchanges occurs when a consumer does not have enough stamps to redeem the merchandise she desires. The sale of stamps also occurs when a stamp saving consumer wants cash rather than any of the redemption merchandise offered by the company whose stamps are sold.

Usually the customer of an exchange simply wants to exchange one type of stamp for another. This type

of exchange normally occurs when the consumer has accumulated a quantity of stamps not of the type she principally collects. She then desires to exchange the different varieties of stamps she possesses for a single variety in order to increase her choice of merchandise items or to acquire a particular item for which she had insufficient stamps prior to the exchange. This exchange service costs an exchange charge, or "commission fee", of from twenty five cents to fifty cents.

S. & H. asserts that if a housewife can obtain S. & H. stamps from an exchange or an unlicensed retailer she will not have the same incentive to patronize S. & H.'s licensee's that she would otherwise have if their stamps were obtainable only from them. Therefore, the S. & H. system of promoting retail merchandise would become less attractive to a prospective or present licensee and S. & H.'s business would be materially injured.

Whenever S. & H. has learned of unauthorized trafficking in its stamps it has uniformly sought to stop the practice. The procedure normally involves, first, a letter written by the company's attorney to the trafficker telling him that he is trespassing upon S. & H.'s rights and informing him that S. & H. intends to seek an injunction if he does not desist. S. & H. supplies citations to the legal authorities which have unanimously supported its position, with the hope that the trafficker will voluntarily discontinue the unauthorized use. If the trafficker persists it is the practice of S. & H. to seek an injunction.

From 1904 to 1966, S. & H. was involved in forty-three actions in eight federal districts and nineteen states to enjoin the unauthorized use of trading stamps. Each of the forty-three cases resulted in an injunction against the defendant.

Four states have statutes prohibiting, in one way or another, the issuance or redemption of trading stamps without the consent of the trading stamp company that originally issues the stamps.

THE LAW

The Federal Trade Commission Act, 15 U.S.C.A., § 45, empowers the Federal Trade Commission to prevent unfair methods of competition in commerce. The Sperry and Hutchinson Company claims that the Commission has exceeded its authority in the issuance of the order now under review.

The Commission determined that S. & H.'s resort to the courts to eliminate trafficking in its stamps substantially reduced the volume business of the exchanges and that these actions constituted "unfair methods of competition in commerce and unfair acts and practices in violation of § 5". This finding being subject to review,⁴ we are compelled to disagree.

The traffickers in S. & H. stamps have been enjoined forty-three times by state and federal courts. This court action has no doubt injured the businesses of the traffickers. However, the Commission cannot rest its case solely on the determination that injury to a competitor exists.

To be the type of practice that the Commission has the power to declare "unfair" the act complained of must fall within one of the following types of violations: (1) a per se violation of antitrust policy;⁵ (2) a

⁴ See *Federal Trade Commission v. Brown Shoe Company*, 384 U.S. 316, 320.

⁵ Justice Black in *Northern Pacific Railway v. United States*, defined a per se violation: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry

violation of the letter of either the Sherman, Clayton, or Robinson-Patman Acts; or (3) a violation of the spirit of these Acts as recognized by the Supreme Court of the United States.

There is no per se violation, or violation of the letter, of the antitrust statutes in this case. The remaining question then is: Have the activities of S. & H. violated the spirit of the antitrust statutes? We think not.

In *Atlantic Refining Company v. Federal Trade Commission*, 381 U.S. 357 (1965), the Supreme Court made it clear that, in determining when § 5 may be applied to conduct which does not specifically violate the existing antitrust laws, the Court means conduct which bears "the characteristics of recognized antitrust violations".

In *Federal Trade Commission v. Brown Shoe Company*, 384 U.S. 316 (1966) a case relied on heavily by the Commission, the Supreme Court significantly broadened the reach of § 5. However, the Court simultaneously limited the restraining power of the Commission to conduct of corporations which bear "the characteristics of recognized antitrust violations". The Court said, at page 322:

We reject the argument that proof of this § 3 [Clayton Act] element must be made * * * our cases hold that the Commission has power under § 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws. This power of the Commission was emphatically stated in *Federal Trade Commission v.*

as to the precise harm they have caused or the business excuse for their use". 356 U.S. 1, 5. (1958).

Motion Picture Advertising Company, 344 U.S. 392, at pp. 394-95:

"It is * * * clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act * * * *to stop in their incipency acts and practices which, when full blown, would violate those Acts (emphasis ours)* * * * as well as to condemn as 'unfair methods of competition' existing violations of them."

Competitive practices need not be specific, established violations of one of the existing antitrust laws to be "unfair" within the meaning of the Federal Trade Commission Act. However, the practice complained of must be more than a mere restraint of competition. It must be a practice "which when full blown would violate those acts" or one which has "the characteristics of antitrust violations".

The Congress could not have intended to vest the Commission with such broad discretion as to allow it to label a restraint "unfair" without applying some judicial guidelines in making their findings. The Commission should at least determine that the practice violates the policy or spirit of the antitrust law. If it does not, then the Commission casts itself in the form of a legislative body.

Considerable importance should be given to the fact that while permitting a small group of businessmen to operate a business the legality of which has been rejected by the Courts the Commission order would itself restrain competition between S. & H. and other stamp companies.* The order would make all

*The Commission determined that trading stamps are "a viable means of competition at the retail level" and "have become an integral and important part of retailing in Amer-

stamps interchangeable and would reduce as against other trading stamp companies the effectiveness of S. & H.'s competitive tools, such as its nationwide coverage and the high merchandise value of "Green" stamps. Such restructuring of an industry to eliminate legitimate competitive distinctions and to reduce all competitors to a common level is exactly what the Supreme Court condemned in *Federal Trade Commission v. Sinclair Refining Company*, 261 U.S. 463, 475 (1923).

The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain, and to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.

Although fairly challenged to do so in S. & H.'s main brief, the Commission has been unable to point to any antitrust law which S. & H. has violated either

it". This accorded with the finding of the examiner that "in the issuance of its complaint, the Commission took pains not to attack the trading stamp business as such".

Upon the basis of exhaustive analysis of the evidence of record and personal observation of the demeanor of the witnesses, the Examiner concluded that serious damage would be visited upon S & H through commercial trafficking in S & H stamps and that the action of S & H alone in stopping that activity was inherently essential to the conduct of the trading stamp business.

The Federal Trade Commission Act and the Clayton Act.

in letter or spirit. This Court must hold that the efforts of S. & H. to prevent that which time and time again has been declared unlawful do not constitute practices of the type that transgress the spirit of the antitrust laws and consequently the Federal Trade Commission's cease and desist order exceeds its statutory authority.

The petition for review is granted and the order of the Commission is set aside.

So ORDERED.

WISDOM, Circuit Judge dissenting:

By this decision the Court blesses unfair, anti-competitive practices against three groups. First, the Court approves practices by trading stamp companies that eliminate a whole class of small businessmen—those who operate trading stamp exchanges. Second, the Court denies to independent retailers, competing with S. & H. licensed retailers, freedom to use the effective competitive tool of offering *their* goods and services for trading stamps. Third, the decision deprives housewives and other consumers of the competitive effects and useful services provided by the exchanges and by retailers (both licensed and unlicensed) who redeem stamps.

Trading stamps are a substantial competitive force in the marketplace, an integral and important aspect of retail distribution in the United States, especially in food retailing.¹ In many areas the retail grocery stores

¹ In 1964 S & H issued 140 billion stamps for which licensed retailers paid \$322,296,000. The retailers gave S & H trading stamps in connection with sales of ten to fifteen billion dollars worth of goods and services. About 60 percent of all households in the nation save S & H "green" stamps.

In 1964 trading stamps of all companies were issued in connection with annual sales to the consuming public of about \$40,000,000,000.

using trading stamps dominate the market.² The Court's decision, therefore, will tend to increase the dominant position of those stores to the detriment of competing retailers and to the detriment of consumers on whom ultimately falls the burden of paying for trading stamps.³

² The Commission found:

In a number of metropolitan areas stamp dispensing by supermarkets accounts for a major proportion of the retail food business. Twelve supermarket chains accounted for a third of respondent's revenue of 1965, all of which became customers since the 1950s. The following are some of the markets in which stamp dispensing supermarkets account for over 70 percent of retail food volume: Dallas, Fort Worth, 97 percent; Miami, 79 percent; Albany, 78 percent; Jacksonville, 77 percent; Salt Lake City, 86 percent; Little Rock, 79 percent; El Paso, 72 percent.

³ Trading stamp companies contend that the cost of stamps are absorbed by the licensed retailers who do not raise prices but hope to profit from an increased volume of sales. In 1966 the average price paid by retailers for stamps was \$2.23 for 1,000, or 1¢ for about 5 stamps. S. & H. charges a comparable amount, \$2.70 for a book of 1,200. This is 2¼ percent of the sales on which stamps are given.

On the other hand: "A substantial number of retailers admit that they cannot offset the costs of stamps at all except by passing the cost on to the consumer in the form of higher prices. ¶ "Should the retailer wish to abandon the stamp plan rather than raise his prices, he is faced with some difficulty, for once his customers have begun to save stamps they will not want to stop before they have acquired enough stamps for redemption. This makes it virtually impossible for the retailer to stop giving stamps without losing business. Therefore, when the retailer's market area reaches the point of trading stamp saturation, continued membership in the stamp plan does no more than allow the retailer to meet competition. If he withdraws from the stamp plan, he will stand to lose business. If he continues to give stamps, he will have to raise prices and thereby antagonize his customers. All the retailers in the area, being faced with the same choice, will probably raise prices. In 1958, when

The Commission concluded that between 5 and 14 percent of S. & H. stamps are never redeemed.* The right of consumers to transfer and sell stamps at stamp exchanges and the right of independent retailers to redeem stamps would reduce this economic waste. In addition, the existence of stamp exchanges will enhance price and quality competition among stamp companies as to the merchandise they offer for redemption. Obviously, it is to the interest of S. & H. to prevent trading in stamps—here pejoratively en-

only seven out of ten leading supermarket chains were giving stamps, a study by the Département of Agriculture showed that prices in stores which gave stamps were at least six-tenths of one per cent higher than in stores which did not give them. Today, with trading stamp saturation in many areas, it is probable that this figure has become more substantial. ¶ *"The Consumer.*—The housewife cannot decline to save stamps; she is virtually forced to do so. If she does not, the buyer who shops at the same store and does save stamps will be paying lower prices for the same purchases. Thus, in order to take advantage of the lowest possible prices, the housewife must submit to the collecting of trading stamps. Moreover, she must choose stores by the kind of stamps they give, for few people will find it profitable to save more than two types of stamps. ¶ "Even if a consumer decides to collect stamps and pay the resulting higher prices, she may not be getting the promised value upon redemption. Stamps are redeemed in some states in either cash or merchandise at the option of the holder. Under these circumstances, the cash redemption value is always much lower than merchandise redemption value. * * * " Comment, *Trading Stamps*, 37 N.Y.U.L. Rev. 1090, 1094 (1962).

* From 1914 through 1964, S & H issued 1120 billion stamps. At the end of 1964 156 billion stamps, worth many millions of dollars, were still outstanding. The Commission found that the record did not permit a determination with certainty of the percentage of stamps never presented for redemption by the public, but concluded that it was probable that redemptions would fall "somewhere between 86 and 95 percent of total stamps issued".

titled "trafficking" in stamps. But, under the language of the Federal Trade Commission Act and *Federal Trade Commission v. Brown Shoe Co.*, 1966, 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587, that interest is irrelevant, if the suppressive practices are unfair methods of competition.

The majority fails to give effect to the broad authority Congress granted to the Federal Trade Commission to protect the public from unfair, anti-competitive business practices. "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" are unlawful under Section 5 of the Federal Trade Commission Act. The Act does not define the prohibited unfair methods or practices; they are too numerous, too varied, and evolve with the times. Instead, Congress decided that it would be better "by a general declaration [to] leave it to the Commission to determine what practices were unfair". S. Rep. No. 597, 63 Cong. 2d Sess. (1914). The House Committee Report is equally positive (H.R. Rep. No. 1142, 63d Cong., 2d Sess. 18-19 (1914):

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.

After both Houses passed the bill, the conference committee changed the phrase "unfair competition" to "unfair methods of competition" to avoid any inference that the Act applied only to those forms of unfair competition which were known at common law. 51 Cong. Rec. 12,145; *Federal Trade Commission v.*

R.F. Keppel & Bros., 1934, 291 U.S. 304, 310-12, 54 S.Ct. 423, 78 L.Ed. 814. Soon after the Federal Trade Commission Act became law the Supreme Court in *Federal Trade Commission v. Beech-Nut Packing Co.*, 1922, 257 U.S. 441, 453, 42 S.Ct. 150, 66 L.Ed. 307, specifically noted that Congress intended the question whether any particular practice was an unfair method of competition to be "determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes."

Moreover, in 1938, with the passage of the Wheeler-Lea Amendment to the Federal Trade Commission, Congress broadened the Commission's authority by authorizing action in protection of the consumer. The House Report stated this Congressional purpose, as follows (H.R. Rep. No. 163, 75th Cong., 1st Sess. p. 3 (1937)):

* * * this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.

The Senate also emphasized the intention of the Amendment to protect the consumer by stating that where acts and practices are "unfair" to the "public generally" they should be stopped "regardless of their effect upon competitors." S. Rep. No. 1705, 74th Cong., 2d Sess., pp. 2-3 (1936). In *Federal Trade Commission v. Colgate-Palmolive Co.*, 1965, 380 U.S. 374, 384, the Supreme Court commented that the Wheeler-Lea Amendment showed Congress' "concern for consumers as well as for competitors." Thus, the Commission may act whenever it uncovers practices which are undesirable or inimical to the public interest.

The Supreme Court has approved of an expansive concept of the Commission's authority to exercise dis-

cretion in defining "unfair methods of competition". In *Brown Shoe*, the Court declared, "[T]he broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such policies may not actually violate these laws." 374 U.S. at 721. Section 5 may be used "to arrest trade restraints in their incipency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws". 374 U.S. at 322.

Brown Shoe had forerunners. In *Federal Trade Commission v. R. F. Keppel & Bro.*, *supra*, 291 U.S. at 314, 54 S.Ct. 423, 78 L.Ed. 814, the Court remarked that "[n]ew and different 'unfair methods of competition' must be considered as they arise in the light of circumstances in which they are employed." In *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953), the Court noted that in enacting Section 5;

Congress advisedly left the concept [unfair methods of competition] flexible to be defined with particularity by the myriad of cases from the field of business.

More recently in *Pan American Airways v. United States*, 371 U.S. 296, 307-08 (1963), the Court reiterated these fundamental principles remarking that:

* * * "unfair methods of competition" are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly.

Again in *Federal Trade Commission v. Colgate-Palmolive Co.*, 1965, 380 U.S. 374, the Court noted "the generality of these standards of illegality" stating that "the proscriptions of § 5 are flexible".

Brown Shoe has been criticized as raising "issues far beyond the law of exclusive dealing".⁵ For example, "Is it consonant with our democratic traditions to permit an administrative agency to refashion statutory standards of legality with no limit except the vague concept of incipency?"⁶ The Commission decision in this case has been said to be "a significant departure from past utilizations of section 5" in that in the past the issue under section 5 has been whether the questioned practice was "a violation of either the language or the spirit of the other antitrust laws".⁷ But now, so it is said, the "new standard" is a per se standard and turns "not upon whether the act or practice violates the spirit or letter of the other antitrust laws, but simply upon whether it has an adverse effect upon competition".⁸

I must say that I do not understand what the Court means by asserting that there was no violation of the letter or the spirit of other antitrust laws. The Sherman Act condemns actions "in restraint of trade", but it does not specifically define action in restraint of trade. As a term, "restraint of trade" is as broad as "unfair methods of competition". The "letter" of the Sherman Act is broad enough, without benefit of the "spirit". There should be little doubt that with benefit of the spirit of the Sherman Act, the Commission acted within the scope of Section 5 of the FTC Act. S & H's practices here restrained the trade of retail merchants by depriving them of their free-

⁵ Handler, *Some Misadventures in Antitrust Policymaking*, 76 Yale L.J. 92, 98 (1966).

⁶ Id.

⁷ Comment, *The Attack on Trading Stamps—an Extended Use of Section 5 of the Federal Trade Commission Act*, 57 Georgetown L.J. 1082, 1090.

⁸ Id. at 1091.

dom to use tools (goods and services for stamps) used by their competitors, the S & H exclusive licensees.⁹ S & H did not simply restrain the stamp exchanges in trading: S & H put them out of business.¹⁰

Second, what S & H argues and what the Court seems to say is that before the Commission may condemn an act as "unfair" it must be an act which previously has been held to violate an antitrust law; otherwise, the Commission is establishing a new per se standard beyond the scope of its delegated authority. But Congress delegated broad powers to the Commission to declare trade practices unfair on a

⁹ The Commission observed that such retailers were not attempting to obtain S & H's "Green" stamps for reissue, but only to attract customers. They were "vying for the patronage of consumers who collected S & H and other trading stamps". The Commission concluded that where a retailer was faced with stamp competition an effective countermeasure might be to offer to exchange or redeem stamps, and that S & H had prevented this type of competitive reaction.

¹⁰ The Commission found that S & H had prosecuted a substantial number of suits during the 1957-65 period, and had issued 315 warning letters, all for the purpose of suppressing what S & H regarded as "unauthorized" redemption of its stamps. In virtually all cases, the Commission pointed out, the "firms (many of which were retailers) were forced to abandon their redemption or exchange practices". The Commission found that the dominance of S & H in the trading stamp field, and the popularity of the S & H "Green" stamp, gave S & H virtual monopoly power over the existence of the small trading stamp exchanges which were unable to operate effectively without S & H stamps. With respect to trading stamp exchanges, the Commission determined that the effect of S & H's activities

*** tended to eliminate the operations of a whole class of businessmen who provided, or had been providing, a useful and valuable function.

case-to-case approach. The Commission is well aware of this. It started with the premise that trading stamps are not per se unlawful.¹¹ The Commission then went about its business of examining the facts to determine whether the adverse anti-competitive effects of S & H's practices are substantial enough to require that the public interest in preserving competition take precedence over the business justification for S & H practices. I agree with Commissioner Elman that a broad study and analysis of the trading stamp industry would serve the public interest better than a case-by-case approach.¹¹ But as I read the legislative history of the Federal Trade Commission Act and the Supreme Court decisions construing it, the Commission did exactly what Congress intended it to do—that is, decide whether S & H's practices were unfair on the facts before it in the light of the public interest. On the record before it, the Commission properly decided that S & H had engaged in unfair, anti-competitive practices.

I am particularly concerned over the Court's lack of consideration of the consumer's interest. (1) The cost of the stamps is reflected in the retail price structure. Wholly aside from the question whether a trading stamp company may impose restraints on alienability, it seems to me that fairness to consumers requires that they should have the right to dispose of stamps that came to them with their purchases of goods and services. (2) Because of the stamp company's restraints on transfer of stamps along with the uniform practice of requiring 1200 stamps to a book (treated as a unit) the housewife is

¹¹ Concurring statement of Commissioner Elman.

locked in—tied to the S & H retailer, in order to get the full benefit of the prices she pays. See footnote 3. Thus, the system, for reasons unrelated to the price or quality of products, tends to take away the consumer's freedom of choice to buy in the open market, putting the consumer under the artificial compulsion to deal with a supermarket already enjoying a dominant position. (3) This is a nation on wheels. We have great numbers of migratory workers and citizens who move from city to city. This group of consumers is benefited and the economic waste in unredeemed stamps is reduced, if consumers are able to exchange stamps they receive in one section of the country for stamps they receive in another section.¹²

In sum, the record supports the Commission's findings that S & H's suppressive activities have a detrimental effect on consumers and on competition. These effects outweigh the damage to the stamp companies that will be caused by the Commission's order.

One final point: I attach little importance to S & H's success in the courts. That was private litigation. Here, however, the Federal Trade Commission, under a broad grant of authority from Congress, has brought the proceeding in the public interest.

I would affirm and enforce the cease and desist order.

¹² Many brands of stamps are dispensed mainly in one region, e.g., Blue Chip stamps in California, Frontier stamps in Texas, Stop & Save in the East. The trading stamp exchange enables consumers to trade stamps collected in one location, and not found in the area to which they have moved, for those dispensed and redeemed in the new area.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

October Term, 1969

No. 26739

T.C. No. 8671

THE SPERRY AND HUTCHINSON COMPANY, PETITIONER

versus

FEDERAL TRADE COMMISSION, RESPONDENT

***Petition to Review and Set Aside an Order of the
Federal Trade Commission (Georgia Case)***

**Before JONES, WISDOM, and COLEMAN, Circuit
Judges.**

J U D G M E N T

This cause came on to be heard on the petition of the Sperry and Hutchinson Company to review and set aside an order of the Federal Trade Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Order of the Federal Trade Commission in this cause is set aside; and that the petition for review is granted in accordance with the opinion of this Court.

SEPTEMBER 29, 1970.

Issued As Mandate: Oct. 21, 1970.

APPENDIX C

United States of America Before Federal Trade Commission

Commissioners Paul Rand Dixon, Chairman, Philip
Elman, Everette MacIntyre, Mary Gardiner Jones,
James M. Nicholson

Docket No. 8671

In the Matter of

THE SPERRY AND HUTCHINSON COMPANY, A
CORPORATION

Findings as to the Facts, Conclusions and Final Order

The Federal Trade Commission issued its complaint in this matter, charging respondent with unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)). Hearings were held before a hearing examiner of the Commission, and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed February 10, 1967, the hearing examiner found and concluded that certain of the charges in the complaint were sustained by the evidence and other charges were not so sustained, and he entered an order to cease and desist as to those charges which he found to be sustained.

The Commission having considered the cross-appeals of counsel supporting the complaint and the respond-

ent and the entire record, and having determined that the initial decision is inappropriate to the extent indicated in the accompanying opinion and should be vacated and set aside, now makes this (as supplemented by the accompanying opinion), its findings as to the facts, conclusions drawn therefrom, and order, the same to be in lieu of those contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, The Sperry and Hutchinson Company, more commonly known as "S&H," is a corporation organized and existing under the laws of the State of New Jersey and it has its principal office and place of business at 330 Madison Avenue, New York, New York (comp., ans.). Respondent, which was incorporated in 1900, is engaged primarily in the trading stamp business. It is the oldest and largest trading stamp company in the United States (CXs 3, 5 *in camera*, 198; RX 924 (prospectus)).¹

2. Respondent has licensed approximately 55,000 retailers to use its trading stamps, and these retailers distribute respondent's stamps (S&H green stamps) to over 70,000 retail outlets located throughout the United States. A trading stamp is a small piece of gummed paper about the size of a postage stamp. It is given by the retailer to customers upon the purchase of goods or services and it is redeemable, usually in merchandise, at centers operated by the trading stamp company. Respondent maintains more than 850 such redemption centers. In 1965 respondent distributed

¹ Explanatory note: The examiner, in referring to respondent's prospectus of April 27, 1966, identifies it as RX 924(b). The exhibit itself is identified only as RX 924 and it was received into the record as RX 924. It is therefore referred to here as RX 924.

approximately 32 million copies of its catalog illustrating and describing the merchandise offered. With gross annual receipts of over \$300 million, respondent issues between 37 percent and 40 percent of all trading stamps in the United States. It employs approximately 9000 people on a regular basis (comp.; ans.; RX 924; CXs 3, 5 *in camera*). From 1914 to 1964 respondent issued 1120 billion stamps, of which 964 billion were redeemed (CXs 440, 444).

3. Respondent, in connection with the aforementioned trading stamp business, is widely engaged in interstate commerce and in "commerce" as that term is defined in the Federal Trade Commission Act. Respondent's trading stamp business is a nationwide operation. From its main office in New York City it controls the operation of its business through nine distribution centers, each located in a different State, and 850 redemption centers which are located in 44 of the 50 States of the United States (comp.; ans.; CX 586, p. 100; RX 924). Purchasing is centralized in New York (tr. 4929, 5698). Communications pass between the redemption and distribution centers and the New York office, substantially all of which are across State lines (CX 586; tr. 5701). The merchandise from distribution centers crosses State lines to redemption centers (tr. 4911-4915). Respondent's other activities are also widely in interstate commerce, including its system of the granting of its licenses, the delivery of its stamps and the negotiating of its contracts with 70,000 retailers who dispense its stamps (RXs 3, 413, 924).

4. Respondent's business in interstate commerce is substantial (RX 924, CX 413, and other references referred to in findings 2 and 3, above). Respondent is in substantial competition in the distribution of trad-

ing stamps with other trading stamp companies (RX 924; tr. 4993, 6288-6293; CX 5 *in camera*).

5. Trading stamps have been used since about the turn of the century. Respondent in 1896 pioneered in the business (CX 198). It is only in more recent years when trading stamps have taken on a highly substantial role in retailing, particularly in the marketing of food. Their use increased rapidly after 1950, when supermarkets became interested in them (tr. 5010, 6304). From 1950 to 1962 the share of retail grocery store sales made by stores using trading stamps increased from 1 percent to 47 percent, although there has been a more recent decline to 43 percent (tr. 6430-6431, 6505; CX 681). Most of the companies which are now major competitors of the respondent have come into the business since 1950 (tr. 6288-6289). The major supermarket chains have given impetus to the increase in the trading stamp business. Some use different stamps in different areas (tr. 6511-6516); others have developed or bought their own trading stamp companies (tr. 6291-6292).

6. The trading stamp companies in the United States in 1964 collected about \$800 million for approximately 400 billion trading stamps issued to more than 200,000 retail establishments. Such retailers include food supermarkets, drugstores, gasoline stations and a large variety of other retail stores and service organizations. Trading stamps are issued in connection with annual sales to the consuming public of about \$40 billion in goods and services, about one-half of which are grocery sales (comp.; ans.; CXs 3-B, 411).

7. Leading trading stamp companies in addition to respondent include Top Value Enterprises, Inc. (Top Value); Gold Bond Stamp Company (Gold Bond); E. F. MacDonald Stamp Company (Plaid); King Korn Stamp Company (King Korn); and Blue

Chip Company (Blue Chip). The six largest companies in 1964 represented between 83 percent and 88 percent of the industry (CXs 4, 5 *in camera*).

8. The trading stamp business is a tripartite arrangement in that the conduct of this scheme involves three persons or companies in interdependent relationships—the trading stamp company that issues the stamps and provides for the redemption, the retailer that dispenses the stamps as a sales promotional device, and the consumer who receives the stamps from the retailer and in turn takes them to the trading stamp company for redemption. In the conduct of its business, respondent, pursuant to contracts, issues to retailers pads of trading stamps, for a valuable consideration. The retailers in turn dispense the trading stamps to the consuming public in connection with the sale of goods and the furnishing of services. Respondent, among other things, agrees to maintain redemption stores where the consuming public may redeem for merchandise stamps which have been pasted into books furnished for this purpose. Respondent's license agreements or contracts with retailers are generally entered into for a period of one year, although some are for longer periods and provide for annual renewal unless either party gives notice of termination upon thirty days notice. The retailer-licensee pays respondent for its stamps and services an amount based upon the number of stamps received. The average price in 1966 was \$2.23 for 1000 stamps, which works out to \$2.68 per book of 1200 (which is the size book issued by S&H). The license agreement with the retailer contains the statement that title to the stamps remains in respondent. In most areas the rates charged by respondent for its trading stamps decrease as the volume of usage

increases, and for retailers in certain categories who reach a certain annual level of stamp distribution respondent guarantees that the cost will not exceed 2 percent of the retailer sales (comp.; ans.; CXs 1a, 11; RX 924; tr. 5025-5026).

9. The retailer-licensee, for his part, agrees to advertise the use of S&H green stamps, to furnish his customers with stamp-saver books and catalogs of redemption merchandise (supplied to him by respondent) and to offer stamps on every purchase at the rate of one stamp for each ten cents paid (RX 924; CX 11).

10. Respondent has a policy of limiting its licenses to only one competing retailer in a given area, though it has deviated from this policy in some instances (RX 924; tr. 5016-5017, 5200-5201). Respondent also endeavors to license a group or "family" of non-competing retailers within a marketing area, generally including a store which attracts a large number of customers, such as a supermarket. The latter is referred to as the "key account." The other stores in such family of merchants may include a cleaning establishment, a gasoline station, a hardware store, and such other retailers which are referred to as "associate accounts" (RX 924).

11. Respondent licenses retailers engaged in almost every type of retail business conducted in the United States; however, its stamps are used most often in those fields of retail trade which are characterized by similarity in the products and services offered in high frequency of purchase, such as food stores and service stations. The percentage breakdown of total service revenue for respondent for the year 1965 between major categories of retail licensees is as follows:

Supermarkets and other food stores-----	61.6 percent
Service stations-----	21.2 percent
Department, clothing, dry goods, furniture and general stores.	4.5 percent
Drugstores-----	4.3 percent
Other retail licensees-----	5.6 percent
Incentive programs-----	2.8 percent
Total-----	100.0 percent

12. A substantial portion of respondent's growth in service revenue during the post-World War II period has occurred in the supermarket field. Each of the 12 retailer licensees accounting for more than 1 percent of respondent's service revenue in 1965 was a supermarket chain. These 12 chains accounted for approximately one-third of the company's 1965 service revenue, with no one of them representing more than 7.5 percent of the revenue. These 12 chains are Grand Union, National Tea, Weiss, Acme, Thorofare Markets, First National, Consolidated Foods, Winn Dixie, Publix, Mayfair, Shop Rite and Red Owl (RX 924; tr. 5011-5013, 5194).

13. The books which respondent supplies for stamp savers need 1200 stamps to be filled. Respondent will not redeem stamps until the stamp saver has one full book. A stamp saver may present stamps for the redemption of merchandise at respondent's redemption centers. Stamp savers who are not located near a redemption center may redeem stamps by mailing them directly to one of such centers. In certain States stamps may be redeemed in cash but in 1965 such cash redemptions made by the company were less than .1 percent (RX 924, CX 400).

14. Sixteen States (California, Connecticut, Florida, Indiana, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, South Dakota, Utah, and Vermont) require that the stamp saver be given an option

to redeem stamps in cash. Wisconsin and Wyoming require redemption of trading stamps in cash only. The State of Washington imposes a heavy tax on merchants who use trading stamps redeemable in merchandise. With the exception of Wyoming the above-listed States also require that the stamp saver be permitted to redeem less than a full book of stamps when redemption is made in cash if stamps having a minimum value specified by the statute are presented for redemption. The State of Kansas prohibits the issuance of trading stamps on sales of merchandise (RX 924; tr. 516, 517).

15. Respondent offers its stamp savers the choice of over 2000 merchandise items, most of which are nationally advertised brands available at its redemption centers. These include various household items such as textiles, flatware, kitchen utensils, lamps and small appliances, as well as leather goods, apparel, photographic equipment, sporting goods, jewelry and various other types of merchandise, all of which are illustrated and described in a catalog published each year by the respondent. The number of filled stamp books required to redeem the items in the company's recent catalog range from 1 to 385. Respondent conducts its business on the basis that the average retail value per book of 1200 of respondent's stamps is \$3.00. So measured, the total value at retail of the merchandise distributed by respondent in 1965 would be approximately \$335 million (RX 924; CXs 402, 403).

16. Respondent does not know with certainty the percentage of its stamps which will ultimately be redeemed (since it has a declared policy to redeem all stamps ever issued), but respondent has for more than 40 years kept its financial records and filed its tax returns on the basis that 95 percent of all the stamps issued will ultimately be redeemed (RX 924). Never-

theless, between 1914 and 1964 respondent issued 1120 billion stamps and only 964 billion of these have been redeemed. This is an 86 percent redemption rate (CXs 399, 440). A much higher volume in the use of stamps occurred after 1960, and the possibility exists that there will ultimately be a greater redemption rate of stamps for these later years. It is found, therefore, on the basis of this record, that respondent's redemption rate cannot be exactly determined and that it probably is somewhere between 86 percent and 95 percent of the stamps issued.

17. The contracts between respondent and retail licensees contain the express provision that the stamps shall be issued one for each ten cents of cash payment and that they shall not be used except in the manner provided (CX 11).

18. Respondent purports to reserve title to the stamps by providing in the agreement with the retailer licensees that title to the stamps shall remain in the respondent and shall not pass to anyone else and by inserting a notice in the collectors books (CXs 11, 401). Respondent, in any cases where application is made, gives permission to a collector to turn over his stamps to another bona fide collector of S&H stamps (CX 401). Respondent restricts the use of its stamps to its licensees and their customers (CX 401). The notice in respondent's collectors books has been substantially the same since the year 1896 (stip. 942). Respondent requires that at least one book be filled before it will redeem the stamps (CX 401).

19. There is no notice on the stamps themselves as to respondent's policy on transferability (CX 1a). Consumer witnesses were doubtful or uninformed as to respondent's policy on transferability (tr. 2096, 2097, 2106, 2155-2157, 2173). Some of the consumer witnesses were not aware of respondent's policy for get-

ting permission from respondent before swapping stamps (tr. 2173). Respondent's written notice permits swapping among "bona fide" collectors. In 1960, 20 percent of all stamp savers swapped with other collectors (CX 626a), mostly unauthorized (tr. 5063). Respondent has taken no action against collectors swapping among themselves except for the notice in the collector's book (tr. 5069-5070). No taxes are paid on stamps issued by the company and in the hands of retailer licensees (tr. 5076). Respondent does not replace stamps stolen from its retailer licensees (tr. 5076).

20. In recent years respondent has encouraged and promoted the idea of the pooling of S&H stamp savings by members of churches, charities, or fraternal groups for the purpose of benefiting their organization (tr. 4896, 5976-6030; RXs 1000a-1004b).

21. Some retailers engage in the practice of giving multiple stamps. One such method is "double stamping," that is, the dispensing of two trading stamps for each ten cents worth of goods or services. "Bonus stamping" is the dispensing of a number of extra stamps in connection with the sale of a specified item or in connection with the total purchases exceeding a specified amount (tr. 5231-5232, 7129). "Extra stamps" include those received from double or bonus stampings (tr. 7129-7130). "Institutional stamping" relates to the issuing of bonus stamps in connection with total purchases exceeding a specified amount (tr. 3531, 3719, 5231, 5232, 6872, 7129, 7130; CXs 33, 69).

22. The trading stamp industry is highly concentrated and respondent is a prominent factor in the industry. According to various estimates, the number of companies engaged in the trading stamp business is somewhere between 200 and 400, although many of these are very small (CX 10a-c; RX 924; tr. 6285,

6286). Respondent's estimated share of the industry in 1964 was 38 percent of the stamps issued and 40 percent of the dollar volume received. In the same year five other companies, i.e., Top Value, Blue Chip, Gold Bond, Plaid and King Korn, collectively accounted for 50 percent of the stamps issued and 43 percent of the dollar volume received. Accordingly, the six largest companies represented between 83 percent and 88 percent of the industry (CX 5 in camera).

23. In a number of metropolitan areas stamp dispensing by supermarkets accounts for a major proportion of the retail food business (RX 1012). Twelve supermarket chains accounted for a third of respondent's revenue of 1965, all of which became customers since the 1950s (tr. 5240). The following are some of the markets in which stamp dispensing supermarkets account for over 70 percent of retail food volume: Dallas, Fort Worth, 97 percent; Miami, 79 percent; Albany, 78 percent; Jacksonville, 77 percent; Salt Lake City, 86 percent; Little Rock, 79 percent; El Paso, 72 percent (RX 1012).

24. From 1950 to 1962 the share of retail grocery sales made by stores using trading stamps increased from 1 to 47 percent (CX 681). The stamp-dispensing retailers include all the topmost supermarket chains in the United States (though they all do not use stamps in every market in which they do business), namely, Atlantic & Pacific Tea Co., Safeway, Kroger, National Tea, Loblaw, Colonial, Jewel, Winn Dixie, Acme, Allied, Grand Union and First National (tr. 6511-6516). Food stores using trading stamps embraced 46 percent of all food retailing in the United States in 1964 (tr. 6430).

25. The trading stamp business, particularly in the food industry, is substantial (references in findings 23 and 24, above).

*The One-for-Ten Policy or Practices Charged Under
Count I of Complaint*

26. The "one-for-ten" provision has, for many years past, been a part of respondent's contracts with its retail merchants (comp., ans.).

27. Respondent, under the terms of the license contracts, requires that its licensees issue only one stamp for each ten cents worth of goods or services (comp., ans., tr. 4984, CX 11). Respondent does not take action in all cases in which retailer licensees issue multiple stamps, particularly in instances where the retailer licensees are issuing multiple stamps to meet competition (tr. 4986-4987). In general, however, respondent pursues a policy of discouraging in every possible way the use of multiple stamps (comp., ans., tr. 4984).

28. Respondent's policy of requiring retail licensees to issue one stamp with each ten cents of the purchase was enforced in a substantial number of instances at the request of retailer licensees competing with the multiple stamper (respondent's ans., par. 8 thereof).

29. Respondent's action upon such complaints from licensees varied from case to case; in some instances a threat to cancel was made (CXs 18-a -b, 19, 21, 128, 130). In other instances a simple request to desist was made (CXs 63, 90-92, 100-104). In many instances respondent's field representative visited the offending retailer and requested the practice to be stopped (tr. 3537). The hearing examiner, in Appendix A attached to his initial decision, listed the various "behest" instances and the action taken by respondent. No exception has been taken to the appendix, including the references therein. Such ap-

pendix will be incorporated herein. It is attached hereto and identified as Appendix A.

30. In most instances the noncomplying retailer agreed to comply, though often later lapsing into noncompliance (references in finding 29, and Appendix A).

31. The amount of commerce involved in the one-for-ten practice is substantial. One in every five trading stamps is given out on a multiple-stamp basis (tr. 6545; references in findings 22-24).

32. There are a number of factors which affect the competition for customers between rival retailers, and foremost would be the matter of price. In addition, there are such items as the attractiveness of the store, convenience of location, parking lots, selections and variety of stock, and similar considerations. Also widely used are the so-called continuity plans. These include such as the following: the giving of different volumes of an encyclopedia over a period of time; promotional games such as where the customer spells out a word or plays "Bingo," and the like; cash-register type plans (that is, so-called trading stamp plans without the glue); the giving of chinaware and other similar promotional schemes. Of all of these, trading stamps hold a special place because of their versatility and price-like nature (tr. 3495, 3547, 6073-6077).

33. Trading stamps are used by retailers as a sales promotion device and as a competitive instrument (tr. 3100, 3183-3184, 322, 6986-6987, 7007). Competitors lower prices to meet double stamps (tr. 3100); double stamps are used to respond to price cutting (tr. 3183-3184, 6986-6987, 7007).

34. Trading stamps are featured in grocery store advertising. In many advertisements claims as to low

prices and trading stamp offers are given about equal prominence (CXs 69-76, 106, 107, 126, 127, and others). Grocery advertisements intermingle price competition with stamp competition (tr. 4044).

35. A national survey among the managers of 541 supermarkets that do not give stamps disclosed that more than half of them (51.5 percent) had reduced prices to compete with stamps (CXs 196-197, 198).

36. While there are other trading stamp companies in the business to which a retailer could turn, in many markets in which respondent's S&H stamp is dominant such an option, as a practical matter, is not available (tr. 4055). Thirty-nine percent of consumers prefer S&H stamps and 62 percent save them (tr. 4054). Loss of the S&H license for a retailer would be to lose his following built up over the years (tr. 5465-5466).

37. In addition to the lowering of prices, a retailer's response to a competitor's introduction of stamps may be the use of trading stamps (if not already so engaged), or the issuance of multiple stamps. In Denver, Colorado, in 1953, the retailers in that market engaged in stamp competition by, first, the dispensing of double stamps, triple stamps, and, finally, quadruple stamps (CXs 147, 148-a and b; references in finding 33).

38. The use of trading stamps is a form or a means of competitive rivalry at the retail level. Trading stamps are versatile as a competitive tool and price-like in nature (tr. 4053, 6057; references in finding 33).

39. Trading stamps affect price behavior (tr. 4053, 7270-7271; RX 24).

40. In the retail food industry, historically, as price competition has intensified, the use of promotion and other forms of nonprice competition decreased and vice versa (RX 24, tr. 4053).

41. Trading stamps have been used to increase traffic (tr. 3670), to sell specific products (tr. 3669, 3672), to meet store openings (tr. 3671-3672, 7007), to shift patronage from regular "shopping days" to another day (tr. 3531-3534, 3673, 6975-6976), and to overcome impediments of poor location and special merchandising problems (tr. 3475-3476, 3490, 3533).

42. Respondent's policy of requiring dealers to limit the dispensing of stamps has restrained competition. The agreement which respondent has with the retailer licensee and the enforcement of this agreement prevents and has prevented the retailer licensee from using his judgment in offering multiple stamps as a spur to competition. The restriction in this regard affects prices, since it eliminates or tends to eliminate price cuts by competitors as a method of responding to multiple stamping (tr. 2996, 3101-3102, 7270-7271, 7277-7280; CXs 196-198). A restriction on the giving of stamps may and does affect the prices of competitors of the stamp-dispensing retailer, thus affecting the market price (tr. 2996-2997, 3101-3103; CXs 196-198).

43. Respondent's restraint on the dispensing of multiple stamps has particularly affected competition in the food industry. In the retailing of food, price and quality competition have declined (tr. 4053, 6431). The structure of the industry in food retailing is such that with few sellers there is a hesitation to lower prices as a sales stimulant (tr. 6435). The imposition of a one-for-ten policy in 1964 affected 46 percent of food retailing (CX 3-B). Trading stamps in 1964 were issued in connection with annual sales to the consuming public of about \$40 billion in goods and services (CX 3-B). Over 60 percent of S&H business is derived from supermarkets and other food stores and S&H is by far the largest organization in the

stamp industry (RX 924, p. 7); supermarkets represent the single most significant block business (tr. 5010-5011). Respondent's restrictive practices concern some of the largest supermarket chains, i.e., Grand Union, National Tea, Acme, First National, Winn Dixie, Consolidated, Red Owl, Shop-Rite, Mayfair and others (tr. 6511, 6516; references in finding 24). In some markets the one-for-ten provision could affect almost all food retailing (RX 1012).

44. In the trading stamp industry, market shares are concentrated in a few hands. Respondent—the largest trading stamp company—has about 40 percent of the estimated \$800 million industry sales (CXs 3-A -B, 5 *in camera*). Respondent is almost three times the size of its nearest rival (CX 5 *in camera*). Respondent, plus five other companies which all have a one-for-ten provision—Top Value, Blue Chip, Gold Bond, Plaid and King Korn—account for about five-sixths of the industry's business (CX 5 *in camera*). Since the 1960s the share of all retail sales by stamp-dispensing retailers has been about 16 percent (tr. 6303, 6304). Trading stamps are issued in connection with annual sales to the consuming public of about \$40 billion in goods and services (CX 3-B).

45. The following trading stamp companies use contracts providing for the dispensing of stamps on a one-for-ten basis (this listing is taken from the initial decision and is not factually in dispute):

Trading Stamp Company	Stamp Issued	Commission Exhibit
National Enterprises, Inc.	Top Value	43.
Top Value Enterprises, Inc.	Top Value	44, 52a-c.
E. F. MacDonald Stamp Company	Plaid	53a-b, 54a-c.
Merchants Green Trading Stamp Company	Merchants Green	55a-b.
King Korn Stamp Company	King Korn	56.
Gold Bond Stamp Companies (Subdivision of Premium Service Corporation which used to be known as Gold Bond Stamp Co. (Tr. 3576)).	Gold Bond	57-58, 630-633G.
Blue Chip Company (for a limited period 1957-1960)	Blue Chip	2x27-28.
Respondent.	S & H Green	11, 567b.

In some cases there were express provisions for special exemptions.

46. The effect of the foregoing acts and practices has been to:

(a) tamper with prices and price behavior and to interfere with the free play of market forces at the retail level particularly in connection with food retailing;

(b) impair and unreasonably restrain competition among retail merchants;

(c) induce, organize and to put together a combination among competing retail merchants to restrain and limit competition in the dispensing of trading stamps.

47. There are a substantial number of instances involving several sections of the United States where licensees of respondent requested it to urge or take action against other retail licensees in competition with them to cease issuing multiple stamps. Respondent, at the "behest" of the licensees, took action in various ways to bring the multiple stamping licensees into compliance with its policy. These actions varied from simple requests to threats of cancelling the license (comp., ans., references in finding 29 and Appendix A).

48. On one occasion respondent cancelled a license agreement when the retailer refused to adhere to its one-for-ten provision (ans., par. 8). In most of the behest instances the licensees engaged in multiple stamping agreed to discontinue the practice (references in Appendix A).

49. Respondent, by its actions, demonstrated that complaints against multiple stamping would be received and acted upon (CXs 90-94, 116-117, 130-146).

50. Respondent, in many cases, upon receipt of the complaint, went to the party complained against and received an assurance to cooperate by such party and sometimes reported this back to the complaining dealer as a means to obtain the latter's adherence to its policy (references in finding 49, above).

51. The effect of respondent's foregoing acts and practices, including the "behest" situations, has been to induce, organize and to put together a combination among competing retail merchants to restrain trade and limit competition in the dispensing of trading stamps.

52. Respondent's foregoing acts and practices constitute and are unfair acts and practices and unfair methods of competition within the meaning of these terms in Section 5 of the Federal Trade Commission Act.

The One-for-Ten Policy or Practices Engaged In with Others as Charged Under Count II of the Complaint

53. All of the leading trading stamp companies in their contracts with retailer licensees impose restrictions on multiple stamping and generally require that one stamp only is to be issued for each ten cents of purchase price. These include, in addition to respondent, National Enterprises, Inc. and Top Value Enterprises, Inc., which issue Top Value stamps (CXs 43, 44, 52-A, -C); the E. F. McDonald Stamp Company, Plaid stamps (CXs 53-A, -B, 54-A, -C); Merchants Green Trading Stamp Company, Merchants Green stamps (CX 55-A, -B); King Korn Stamp Company, King Korn stamps (CX 56); Gold Bond Stamp Company, Gold Bond stamps (CXs 57-58, 630-633-G); and the Blue Chip Company, Blue Chip stamps (CXs 2227, 28; 2268, 69). The general

basic promotion of all the major stamp companies is one on a dime (tr. 6190-6192).

54. In the carrying out of the one-for-ten policy, some of these and other firms at times acted in combination to enforce such restriction. On one occasion in 1953 in Denver, Colorado, supermarkets using stamps became engaged in competing in the giving of multiple stamps and at one time were issuing four stamps on a dime. A meeting was held October 1, 1953 by the stamp companies whose retailer licensees in Denver had been issuing stamps, namely, the respondent, Gunn Brothers, Pioneer Trading Stamps, Inc., National Gift Seal Co., and True Blue Stamp Company. They agreed to issue a joint advertisement announcing that thereafter firms would require adherence to a policy of one stamp for each ten-cent purchase. An advertisement to this effect was published October 5, 1953 (CXs 147, 148-A, -B; stip. 30; adm. 15-22). Respondent also participated in other discussions involving efforts to stop the issuance of multiple stamps in Denver (CX 148-B). Subsequently, for many years there was little double stamping in Denver (CXs 189-B and D, 191-B, 192, 193-D, 195; RX 548).

55. Other instances occurred in which representatives of competing trading stamp companies and respondent's representatives were in contact in connection with efforts to stop particular situations of double stamping. In May 1961, a Gold Bond representative contacted respondent's man John Holworth in Arizona, advising him of a complaint from Safeway Stores (using Gold Bond stamps) about Pete's Country Store issuing double S&H stamps. The respondent's representative contacted Mr. Termaine of Pete's Country Store about the matter (CX 149-A,

-B). There were other contacts between Gold Bond and S&H (CX 150). Mr. Termaine later decided to limit his double stamping (tr. 5883).

56. In March 1961 a retailer licensee of respondent, Lewis Grocery Co., Greenville, Mississippi, issued double stamps on the opening of a new Safeway store (CXs 155-A, 157-A). Respondent's district manager, Robert A. Sawhill, received a telephone call from a representative of Gold Bond about the practice. Sawhill did speak to someone in Lewis Grocery Company. (tr. 5529) and told him that "* * * Great Safeway was going to lean on him" (tr. 5530), meaning that Safeway would likely respond by issuing multiple (Gold Bond) stamps (CX 155-A, -B). Sawhill later told the Gold Bond representative that the double stamping activity would not be repeated (CXs 157, 160). Apparently respondent's action was not effectual (tr. 5422-5426). (See also admissions 45-52.)

57. Two instances occurred in Iowa in late 1961 and early 1962, involving Gold Bond and the respondent's cooperative efforts to prevent multiple stamping. In one instance Van's Food Market in Pella, Iowa, gave double stamps because Pella Super-Valu was giving free Gold Bond stamps with a \$5.00 order and two other S&H licensees in neighboring towns were giving double stamps. Henry Vandervoort, the owner of Van's Food Store, was told by Mr. Bishop, respondent's local representative, that Van's should have to stop double stamping (tr. 3188). When he refused, Mr. Bixby, respondent's regional manager, telephoned Vandervoort and told him emphatically to quit (tr. 3190). The evidence indicates that the request to Bixby to stop Van's from double stamping had come from Gold Bond (CXs 164, 165, 166). The second incident took place in the Waterloo-Cedar Falls, Iowa area. The evidence here, again, indicates that there were contacts between

representatives of Gold Bond and respondent on the stopping of double stamping (tr. 3140-3141; CXs 161, 163-A, -B).

58. The effect of the foregoing acts and practices engaged in collectively with other trading stamp companies has been to:

(a) tamper with prices and price behavior and to interfere with the free play of market forces at the retail level, particularly in connection with food retailing;

(b) impair and unreasonably restrain competition among retail merchants;

(c) induce and to put together a combination among retailers to limit trading stamp competition;

(d) limit and unreasonably restrain competition among trading stamp companies in the distribution and sale of trading stamps.

59. Respondent's foregoing acts and practices, engaged in collectively with other trading stamp companies, constitute unfair acts and practices and unfair methods of competition within the meaning of these terms in Section 5 of the Federal Trade Commission Act.

Suppression of Trading Stamp Exchanges and Other Redemption Activity Under Count III of the Complaint

60. A trading stamp exchange is a person or business engaged in the exchange of trading stamps issued by one trading stamp company for those issued by another or engaged in the sale or purchase of trading stamps to or from members of the consuming public. These exchanges are small businesses, usually operated by a single individual. Those disclosed by the

record include the trading stamp exchange operated in Oklahoma City by William Rance; that in Tulsa, Oklahoma, operated by Mrs. Regina Lou DeBolt; that operated in Fort Worth, Texas, by Morris Sam. Rance; and the exchange in Corpus Christi, Texas, operated by Herbert Rosenwasser (tr. 1875-1876, 2201-2202; 2327-2328; and Rosenwasser deposition, tr. 2-3).

61. The trading stamp exchanges disclosed by the record are similar in their mode of operation. They buy, sell or exchange trading stamps principally for housewives and charge a commission fee (tr. 1881). William Rance testified that 90 percent of the income of the business was for commissions charged for the exchange of stamps (tr. 1882).

62. The other kind of activity involving the redemption of trading stamps by other than the issuing company pertains generally to retailers who offer to exchange S&H stamps for their own variety of stamps to lure customers into their stores. One example involves Jake's Department Store, Thibodaux, Louisiana. In this instance the retailer offered to give \$3.00 in merchandise for each green stamp book. Respondent warned Jake's Department Store about this practice, and the retailer agreed to discontinue it (CXs 221, 223, 228-B).

63. Another example of trading stamp redemption by others than the issuing company involves the Good Deal Supermarkets in Irvington, New Jersey. In 1958 this store advertised that it would accept coupons and trading stamps to be used to buy food to give to needy families. Good Deal was threatened with litigation by respondent and informed that it had no right to exchange or redeem S&H stamps. It appears that Good Deal eventually discontinued this practice (CXs 232-244).

64. The amount of commerce involved in trading stamp exchanges and redemption activity is substantial or potentially substantial. Respondent itself operates 850 redemption centers (references in finding numbered 3). Trading stamp exchanges may do business in the amount of \$12,000 (CX 526). Collectors informally swap 20 percent of the trading stamps issued (CX 626a).

65. Trading stamp exchange operators M. S. Rance, William Rance and Regina Lou DeBolt all testified that they had a policy against selling stamps to retail merchants (tr. 1922, 2246-2247, 2346-2347). There is no substantial evidence in this record that the practice of reissuing or dispensing stamps previously issued to another retailer is widespread or a significant factor in the trading stamp business.

66. Respondent's policy is to oppose and suppress the operation of trading stamp exchanges and all redemption of S & H trading stamps by persons and firms other than the respondent (respondent's ans., par. 16). The facts supporting such finding are also contained in Appendix B of the initial decision and have not been disputed by the parties. The examiner's Appendix B will be incorporated herein verbatim and designated as Appendix B of the findings of the Commission. Respondent enjoined and suppressed the trading stamp exchanges listed in finding 60 (Rosenwasser dep., p. 14; tr. 1988, 2234-2340, 2344-2345; CXs 602-A, -B, 603, 604, 605-A -607, 608, 609).

67. It is, and for many years has been, the practice of respondent to send warning letters to all persons who respondent has reason to believe are engaged commercially in the business of exchanging respondent's stamps for other trading stamps or for

merchandise, services or money, and to bring suit if necessary to enjoin such actions (adm. 23).

68. Respondent filed as many as 16 complaints seeking injunctions from January 1, 1957 to April 1, 1965, and in this period it issued 140 warning letters to firms exchanging S&H stamps and 175 warnings to persons engaged in redeeming S&H stamps (adm. 24 and 25).

69. Other trading stamp companies, including some of the largest, also reserve title to their trading stamps in a notice in collectors books similar to the restrictions in respondent's collectors books. These include Top Value, King Korn, Gold Bond, Plaid, Merchants Green and Triple S (CXs 209-212, 216-218; adm. 82-86, 116; stip. 43-48).

70. It is respondent's policy to encourage the pooling of stamps for charitable reasons. An example of this is where a church organization decides to acquire a school bus with trading stamps (tr. 2225-2230, 4896, 5976, 6030; RXs 1000-A to 1004-B).

71. Respondent cooperated with or received the cooperation of other trading stamp companies in suppressing the operation of trading stamp exchanges. The hearing examiner's findings on this question, not disputed by the parties as to the facts shown, are incorporated herein and constitute the Commission's findings to follow, numbered 72 through 82.

72. In May of 1962, Robert W. Sweet of counsel to respondent, authorized its local counsel to join Texas Gold Stamp Company in an action to enjoin an unauthorized use in Raymondsville, Texas (CX 312; stip. 49; CPF 82; RPF 165).

73. In December of 1961, Peter A. Cooper, attorney for respondent, wrote United Trading Stamp Company requesting that company to have their licensee, Sponangles Mobile Service, discontinue redeeming

S&H stamps (see CPF 89). Shortly thereafter United Trading Stamp Company responded that they were investigating, and that they would take the necessary steps if they found evidence of improper redemption. They also assured respondent of their continued cooperation in matters of this type (CXs 313-316; stip. 50). The gasoline station ceased redeeming S&H stamps (CX 317; RCPF CPF 89).

74. The attorney for Quality Stamp Company in June 1961 notified respondent's general counsel of an advertisement in an East Memphis, Tennessee, paper by Warren Wooley offering to exchange stamps. Quality's counsel requested assistance in the form of explaining the theory of respondent's actions against such exchanges (CPF 81). Respondent's counsel shortly thereafter warned Wooley to cease his activity and suggested to Quality Stamp Company's counsel that they coordinate their activity with S&H to avoid a multiplicity of suits, if action were required. Some time later, local counsel for respondent in Tennessee talked with Quality's counsel and with counsel for Top Value. Top Value's counsel said that he would have no objection to respondent's joining his action, but that Quality Stamps would not do so because of other matters making it preferable for them not to litigate. Top Value also requested assistance in securing evidence against Wooley. Wooley later gave up its trading stamp exchange business just as Top Value counsel was about to start a proceeding for an injunction (CXs 318-325; stip. 51).

75. In April of 1959, respondent's counsel instructed a local official to speak to Karbe's Supermarkets in Joplin, Missouri, because Top Value's general counsel had advised him that Karbe's was exchanging Top Value for S&H stamps. Respondent's counsel said he had agreed to do all possible to stop the practice.

The local official reported that Karbe's agreed to discontinue the practice in accordance with the request of Top Value's counsel (CXs 326-327; stip. 54; CPF 80; CCPF RPF 168).

76. In September 1959, the general attorney for Top Value Enterprises, Inc., wrote respondent's assistant general counsel that Kirk's Gift Shops in Dayton, Ohio, had ceased redeeming Top Value stamps but were still accepting S&H and King Korn and that he thought respondent would be interested in stopping the practice (CX 328; stip. 52). Respondent's assistant general counsel replied with thanks, stating "we will follow up on this and stop the practice to which you refer" (CX 329). This matter was then referred to outside general counsel to handle (CX 330; stip. 52; CPF 86).

77. In June of 1959, the Gold Bond manager in Denver, Colorado, informed the Grand Junction office of respondent that Kirby Vacuum Cleaner Company in Denver was accepting S&H stamps in lieu of money and that Gold Bond had notified their counsel. The local branch manager of respondent notified respondent's vice president. Then respondent's assistant general counsel sent the matter to outside counsel to handle "in their usual competent way" (CXs 331, 332; stip. 53; CPF 87). Outside counsel wrote Kirby's and received assurances of discontinuance. The local manager of respondent then rechecked Kirby's and found it in compliance (CXs 331-339).

78. In February of 1959, counsel for respondent were informed by Triple S's attorney that Food Land, Inc., in Worcester, Massachusetts, was redeeming S&H and other brands of trading stamps. Respondent's counsel then wired Food Land to cease and, after receiving assurance of discontinuance, told the local manager to check to see that Food Land had,

in. fact, ceased (CXs 340-344; stip. 55; adm. 87; CPF 88).

79. In March of 1957, respondent was informed that Mayfair Market in Red Bank, New Jersey, was accepting S&H stamps for Yellow stamps. In addition to notifying Mayfair Market to cease, respondent notified Philadelphia Yellow Stamp Company that its licensee, Mayfair, was improperly dealing in its stamps. Philadelphia Yellow Trading Stamp Co. agreed that its licensee should discontinue and so notified Mayfair Market. Mayfair needed further urging and so respondent again requested Philadelphia Yellow Trading Stamp Company to take action. Respondent subsequently received a letter from the attorney for Yellow stamps stating that they had again written Mayfair Markets and agreed that trading stamp companies should redeem only their own stamps. The attorney for Yellow Stamp thanked respondent's counsel for advising of the instance and assured respondent's counsel of continued cooperation (CXs 345-352; adm. 88; stip. 59). Following this exchange respondent instructed its Asbury Park employee to recheck and report (CX 53; stip. 59; CPF 83).

80. In May of 1956, Mr. Collins, then a member of the firm of Casey, Lane and Mittendorf as outside general counsel for respondent, arranged with counsel for United Trading Stamp Company and counsel for Top Value to have respondent's counsel in Oklahoma represent all three companies in connection with unauthorized redemption of their stamps by Open Front Food Market in Duncan, Oklahoma (stip. 60; adm. 89; CX 354; CPF 84). Respondent checked and found that this practice had been discontinued. In 1957 it started again. Counsel for S&H requested counsel for United, whose licensee Open Front Food

Market had then become, to take steps to stop Open Front's practice of exchanging S&H stamps (CXs 355-358). United's counsel took the action requested (CX 359).

81. In October 1956, counsel for Community Stamp Company, asked respondent whether or not it would be interested in sharing legal fees if Community decided "to go to bat" to prevent Baries of Saxonburg, Pennsylvania, from redeeming S&H and Community stamps. Respondent turned the matter over to outside general counsel, who wrote Baries to stop, thanked Community's counsel for the information, but reserved decision on whether or not to proceed jointly with Community. Community's counsel later wrote that Baries had discontinued (CXs 360-363; stip. 61). Apparently Baries started again, because in March 1957, respondent's outside counsel wrote to counsel for Prudential Premium Company, whose licensee Baries was, to have Baries cease their unlawful activity, because S&H was "under considerable pressure from licensees in the Saxonburg area to do something about Baries * * * ." Prudential's counsel informed respondent's counsel that he had instructed Prudential to notify Baries to stop (CXs 364-366; stip. 61; CPF 89).

82. In January of 1960, an S&H zone manager notified the home office that R. Donosky, a pawnshop operator in Roswell, New Mexico, was advertising that he would buy S&H and other stamps for \$1.25 per book. The matter was referred through channels to outside general counsel. General counsel wrote Donosky to cease and desist and also wrote three other trading stamp companies—Frontier, Gold Bond and Scottie—sending them a copy of his letter to Donosky. In sending the letter to the other trading stamp companies, Mr. Joyce of outside general counsel wrote:

"We trust that you, too, will wish to take immediate steps to eliminate Mr. Donosky's unlawful interference with your trading stamp business" (CX 372). The letter to Donosky and a second registered letter were returned unclaimed. Gold Bond wrote that it would look into the matter, and Frontier wrote Donosky to cease. An attempt was then made to make contact with Donosky locally. This resulted in securing information that the trafficking in S&H stamps had ceased (CXs 367-a-386; stip. 62; CPF 85; RCPF CPF 85).

83. Respondent suppressed or restricted the activities of the trading stamp exchanges engaged practically exclusively in the business of exchanging or redeeming trading stamps. These include the exchanges listed in finding 60, above. The trading stamp exchanges suffered a serious loss of business when they were compelled to discontinue dealing in respondent's stamps. For instance, William Rance testified that his best estimate of the business lost after respondent obtained an injunction against him was a gross income decline of between 40 and 60 percent (tr. 1912; CX 526-A -X). Mrs. DeBolt testified that 60 percent of the transactions in her exchange involved S&H stamps (tr. 2231).

84. Certain stores and exchanges were forced out of trading stamp exchange operations entirely. For example, the trading stamp exchange in Los Angeles discontinued exchanging stamps upon threat of an injunction (CX 311). Warren Wooley was forced to quit his exchange operation. (CX 325).

85. Victor H. Savin, president of the V. Savin Company, Inc., doing business as Tifon Jewelers in New Haven, Connecticut, in 1958 offered to take in trading stamp books towards the purchase of the products the

company sold, such as diamonds, watches, appliances, luggage, etc. Tifon was forced to discontinue this practice by the respondent. Mr. Savin considered that he was in competition with the trading stamp redemption centers (tr. 2662-2668).

86. Respondent, in suppressing and eliminating trading stamp exchanges and other exchange and redemption activity involving S&H stamps, prevented or restricted retailers from using an effective competitive device.

87. Respondent's dominance in the trading stamp field and the popularity of its S&H stamps magnified the effects of its suppression practices. William Rance testified that in Oklahoma City there were approximately 15 different kinds of stamps but that the three most important were Top Value, Gunn Brothers and S&H (tr. 1904-1912). The effect of respondent's injunction against him went beyond S&H stamps because if customers had S&H green stamps and could not exchange them as part of the whole deal he would lose the transaction (tr. 1912-1913). Respondent had in effect, therefore, a monopoly power over the small trading stamp exchanges. Respondent's actions in suppressing the redemption and exchange of its stamps by trading stamp exchanges has curtailed the operations of a whole class of small businessmen (references in findings 66-68, above).

88. Respondent's policy of suppressing exchanges and the free and open redemption of trading stamps, both alone and in combination with others, has restrained trade. In many instances, the firms—many of which were retailers—were forced to abandon their redemption and exchange practices, thus curtailing their competitive responses (references in findings 66-68, above).

89. The effect of respondent's acts and practices relative to trading stamp exchanges and redemption activity has been

(a) to unfairly suppress such exchanges and the business of retailers and others engaged in trading stamp redemption or exchange activity, to the detriment of the persons engaged therein and the consuming public;

(b) to substantially impair and restrain competition.

90. The foregoing acts and practices relative to trading stamp exchange and redemption activity constitute and are unfair acts and practices and unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent herein.

2. The aforesaid acts and practices of the respondent, for the reasons stated in the accompanying opinion, are to the prejudice and injury of the public, have unreasonably restrained, injured and impaired competition, and thereby constitute unfair methods of competition in commerce and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

3. This proceeding is in the public interest.

ORDER

IT IS ORDERED that respondent, The Sperry and Hutchinson Company, its officers, agents, representatives; and employees, directly or through any corporate or other device, in connection with the issuing,

distribution, sale, or the redemption of trading stamps in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Putting into effect, maintaining, or enforcing any plan or policy under which contracts, agreements, or understandings are entered into with any retailer which have the purpose or effect of:

(a) fixing or establishing the maximum number of trading stamps which may be dispensed by retailers to their customers in relation to such customers' purchases of goods or services;

(b) requiring, expressly or by implication, or suggesting to or inviting any retailer to dispense trading stamps on a basis not to exceed a specified number of trading stamps in relation to purchases by such retailer's customers of goods or services.

2. Securing adherence to a scheme or policy of foreclosing the dispensing of trading stamps at the retail level in excess of any specified ratio of stamps to goods or services sold, by terminating or threatening to terminate or cancel, or refusing to enter into contractual relationship with, or threatening to refuse to deal with, any retailer, or taking any other affirmative action which goes beyond the mere declination to deal with a customer who will not observe such policy.

3. Combining, conspiring, or otherwise knowingly acting in concert with any other person to cause any retailer to dispense trading stamps in any specified ratio of the number of stamps to goods or services sold.

4. Communicating in any way with any other trading stamp company, or acting in any way in response to any communication from any trading stamp company, with respect to the ratio of the number of trad-

ing stamps dispensed in relation to goods or services sold by the retailer.

5. Attempting in any way to:

(a) impair, limit, or make subject to any conditions, whether by a purported retention of legal interest or otherwise, the freedom of any retailer to whom the respondent has issued trading stamps or any person to whom such retailer dispenses or transfers such respondent's trading stamps, to alienate such stamps, and

(b) to suppress or prevent the free and open redemption or exchange of trading stamps or the operation of trading stamp exchanges, whether by bringing any action in any court of any jurisdiction to enforce any purported legal interest referred to herein, or otherwise,

except that the provisions of this paragraph shall not apply to the extent that respondent can establish that dispensing or transferring of respondent's stamps was made with the sale of goods or the furnishing of services by persons or concerns not licensees of respondent.

6. Combining or conspiring with, or soliciting concerted action from, any other trading stamp company to prevent redemption of trading stamps or the operation of a trading stamp exchange.

7. Communicating in any way with any other trading stamp company or acting in any way in response to any communication from any trading stamp company with respect to preventing the operation of any trading stamp exchange or the free and open redemption or exchange of trading stamps by any person.

IT IS FURTHER ORDERED that the respondent, within sixty (60) days after the effective date of this order:

1. (a) notify in writing all of its sales employees, sales representatives, and licensees of the provisions of this cease and desist order;

(b) reform all contracts with retailers or others who dispense S&H green stamps to the public to conform with the provisions of this cease and desist order;

(c) eliminate the "Notice" contained in the S&H stamp-saving book, or reform said "Notice" to conform with the provisions of this cease and desist order.

2. Except as respondent can show that the situations consisted of the dispensing or transferring of respondent's stamps with the sale of goods or the furnishing of services by persons or concerns not licensees of respondent:

(a) notify in writing each person to whom it has written, within the five years preceding the effective date of this order, a letter warning such person not to operate a trading stamp exchange or otherwise engage in the free and open redemption of trading stamps, that the respondent no longer intends to, nor will in any way, prevent such acts by such person;

(b) notify in writing each person against whom it has secured, within the ten years preceding the effective date of this order, an injunction or other restraining order in any court of any jurisdiction, forbidding such person to engage in the operation of a trading stamp exchange or otherwise engage in the free and open redemption of trading stamps, that the respondent will not oppose the dissolution of such injunction or other restraining order.

IT IS FURTHER ORDERED that respondent, The Sperry and Hutchinson Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission. Commissioner Elman concurred and has filed a concurring statement; Commissioner Jones dissented and has filed a dissenting statement; and Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

[SEAL]

JOSEPH W. SHEA,
Secretary.

Issued: June 26, 1968.

Attached are

- (1) Opinion of the Commissioner by Commissioner MacIntyre
- (2) Concurring statement by Commissioner Elman
- (3) Dissenting statement by Commissioner Jones

APPENDIX A-S & H ACTION ON COMPLAINTS BY ONE RETAILER AGAINST ANOTHER

Place	Date	Complaining retailer	Stamps used	Nature of complaint	Other retailer	Stamps used	Action by S & H
Colorado.....	11/61	Competitors unidentified	S & H, others.	Multiple stamping	Red Owl	S & H	Threat to cancel.
Colorado Springs, Colo	3/64	Kaufman, Inc.	S & H	Double stamping	Bains	S & H	Received complaint and asked to stop.
Norwich, N. Y.	9/63	Victory Market	S & H	Extra institutional stamp.	O & W Supermarket	S & H	Visited—asked to stop.
Denver, Colo	5/16/63	Red Owl	S & H	Double stamping	King Scooper	S & H	Visited.
Roanoke, Va.	2/28/63	Thomas Q. Brown, Esso dealer.	S & H	Double stamping	Schneider Oil Co. 86in dealer.	S & H	Visited secured agreement to stop adv.
Danville, Va.	11/10/61 to 4/62	W. T. Grant (E. W. Mayer).	S & H	Double stamping	Johnsen's Dept. Store.	S & H	Visited—Urged to discontinue.
Lawrence, Mass	10/30/61	W. T. Grant (E. W. Mayer).	S & H	Double stamping	Sutherland Dept. Store.	S & H	Visited—Urged to discontinue.
Statesboro, Ga.	4/61, 4/62	Piggley Wiggley	S & H	Extra	Winn Dixie	S & H	Visited—rec'd agreement to stop.
Tampa and St. Petersburg, Fla.	10/60	Liggett Drug Co., Inc.	S & H	Extra stamps	Public Mktg. Instituti'l.	S & H	Visited—Urged to stop.
Buffalo, N. Y.	3/61	Acme Stores	S & H	Extra institutional double stamps.	Loblaws Thordore	S & H	V.P. of S & H had meeting w/Loblaws—tried to stop.

Allentown, Pa. and vicinity 4/60	Millers Northampton, Nelson Freeman, Nazareth.	S & H	Double Stamps on Founder's day.	Zallinger Harned.....	S & H	V.P. wrote Z-H.
Jasper, Tex..... 7/10/59	Minimar.	S & H	Double stamps.	Piggley Wiggley.....	S & H	Reg. rep called on P-W. Rec'd promise to stop.
Salisbury & Cambridge, Md.... 8/57	Acme.....	S & H	Free stamps w/coupon.	Colonial.....	S & H	S & H wrote asking dis- continuance.
Hazleton, Pa..... 9/57	Acme.....	S & H	Double stamp day.....	Genetti.....	S & H	S & H took drastic steps to stop.
Bristol, Conn..... 2/58	Mott's Supermarket.....	S & H	Double stamping.....	Washington Super- ette, Grand Union. Pettit's Market.	S & H	S & H phoned asked to stop at once.
	Pettit Market.....	S & H	Double & extra.....	Mott's.....	S & H	
	Mott's Market.....	S & H	Daily Double Stamps.	Kelley Food & Freezer Co.	S & H	
Carlisle, Mechanicsburg and Lewistown, Pa. 63-64	Javitch Giant Food.....	S & H	Daily Double Stamps.	Wise & Acme.....	S & H	Whitneck tried to stop Wise and Acme.

Exhibit numbers	Witness	STIP.	ADM. Effect	Remarks
Colorado.....	CX 18 a-b, 19, 20, 21.....	12	Ceased.....	Red Owl later given help in advertising.
Colorado Springs Col.....	CX 63, 450, 474, 623; RX 513, 525.....	18	26 Bain ceased.....	It then resumed RPF 83; CPF 21.
Newrich, New York.....	CX 64-67, 69-77, 190 a-b, 451.....	19	Ceased adv.....	At time Victory was also issuing product stamps RPF 81; CPF 23.
Denver, Colorado.....	CX 190 a-b, 61a, 77, 78, 147, 148, 433; RX 548-47; 618-50.....	20	Ceased adv.....	King Scooper one of Denver retailers causing Denver agreement. RPF 80; CPF 25.
Roanoke, Va.....	CX 80-83, 190 a-b, 454; RX 383-386.....	21	Ceased.....	Schneider canceled advertising CPF 26, 27.
Danville, Va.....	CX 85-89, 190, 545-554 455.....	22	Unknown.....	Competition described Grant and Johnson RPF 83-84; CPF 30-31.
Lawrence, Mass.....	CX 90-93, 190, 434-6, 555, 561, 563, 576; RX 12, 369, 383-386.....	23	32 Agreed to discontinue.....	Competition described Grant and Sutherland discontinued advertising 1 year CPF 31; RPF 81.
Statesboro, Ga.....	CX 94, 96, 457; RX 304-362.....	33	do.....	Started up again the following year. RPF 80; CPF 33-36.
Tampa and St. Petersburg Fla.....	CX 100-104, 106-107, 438; RX 528-47.....	24	2 do.....	Started after 8 months claiming oversight CPF 37-39; RPF 81.
Buffalo, N.Y.....	CX 108-110, 459, 432, 580; RX 774-86, 903.....	25	35, 3, 4 Not shown.....	Claimed meeting competition RPF 81, CPF 39-41.
Allentown, Pa., and vicinity.....	CX 116-117, RX 196-297.....	37	Temporarily stopped.....	Not shown that Nelson Freeman complained CPF 43-49; RPF 82.
Jasper, Texas.....	CX 118-124, RX 804-923.....	27	4-7, 5-13 Discontinued for a time in part.....	CPF 41-43, RPF 82.
Salisbury & Cambridge Md.....	CX 124-127, RX 267-269.....	28	39 Not shown.....	RPF 82; CPF 62.
Haddon, Pa.....	CX 128-129; RX 598-617.....	40	Stopped as of 10/20/57.....	CPF 43-44; RPF 84.
Bristol, Conn.....	CX 130-146; RX 402-434.....	14, 29	41, 55 Apparently not permanent stopped temporarily.....	Mott retaliated after double stamps continued and Gettits complained then Kelley started, Mott complained 1962, Mott resumed, CPF 44-47; RPF 83.
Carlisle, Mechanicsburg and Lewisstown, Pa.....	CX 413, RX 568-594.....		None.....	CPF 28-29, RPF 81.
	Javitch, Tr. 3903, Folsom, Tr. 3672-8.....			

APPENDIX B-S & H ACTION TO PREVENT TRANSFER OF STAMPS ISSUED BY LICENSEES TO CUSTOMERS

Name and place	Date	Complaint by	Stamp used	Nature of complaint	Action by S & H	Action by others
Jakes Dept. Store, Thibodaux, La.	9/28/64	Adv.	S & H	S & H books exchanged for mds.	Letter	
Puckett's Food Store, Altus, Okla.	9/28/64	S & H employee	S & H	Redeeming stamps	Shopped and found S & H stamps redeemed.	Lawyers sent letter.
Good Deal Supermarkets, Newark, N.J., and vicinity.	12/3/68	Adv. Newark News	S & H	Redeeming stamps for cash.	Sent to counsel.	Lawyers negotiated settlement.
Sam M. Kelber, Montclair, Calif., and vicinity.	6/26/69	S & H dist. manager	S & H	Redeeming stamps	Referred to California attorney.	Lawyer called.
Dumas Milner Chevrolet, San Antonio, Tex.	11/5/66	S & H manager	S & H	Agreed to redeem stamps	Referred to counsel.	Counsel wrote.
Tilton Jewelers, Gavin Jewelry Co., Bridgeport, Conn.	3/3/68	Adv. Bridgeport Post	S & H	Adv. rec. stamps as down-paym't on jewelry.	Ref'd to local attorney.	Counsel wrote representing several stamp companies.
Buchanan Stamp Exchange, Buchanan, N.Y.	8/27/64	Adv. Pennysaver	All	Trading stamp exchange	Ref'd to attorney	Attorney wrote C & D letter.
John & Al Exchange Service, Largo, Fla.	1/21/64	Adv. sent by local manager.	All	Trading stamp exchange	Ref'd to counsel.	Counsel wrote C & D letter.
Trading Post, Huntington Park, Calif.	6/16/63	Signs	All	Redeeming stamps	Referred to attorney	C & D letter.
Kern's Trading Stamp Exchange, Russellville, Ark.	2/26/63	None		Request for authority to run exchange.	Permission refused.	
Fack-Brown Jewelry and Camera Store, Memphis, Tenn.	11/30/61	Unknown	All	Incidental tr. stamp exch. by camera shop.	Ref'd to local counsel.	
Repoco Cleaners, Rialto, Calif.	10/17/65	Unknown	All	Trading stamp exchange	Ref'd to local counsel.	Shopped.
Trading Stamp Exchange, Los Angeles, Calif.	9/16/60	Lawyer Los Angeles	All	Trading stamp exchange	Ref'd to counsel.	Shopped.
Caplan's Dept. Store, Elliott City, Md.	12/23/68	Unknown	S & H	Permission to redeem with- drawn.	Forbidden to continue.	
Fresman's Dept. Store, Nazareth, Pa.	2/3/61	Unknown	S & H	Permission to redeem with- drawn.	Forbidden to continue.	

Exhibit numbers	witness	Admission	Stip.	Effect	Remarks
Jakes Dept. Store Thibodaux, La.	CX 231-234			31 Agreed to stop.	(Cpl. 75).
Pocketts Food Store Altus, Okla.	CX 235-236			32 Agreed to stop.	
Good Deal Supermarkets Newark, N.J. and vicinity	CX 232-244			40 Agreed to stop.	New Jersey lawyers recommended action. (Cpl. 75).
Sam M. Kalber Montclair, cal. and vicinity	CX 245-253	76-80		39 Obliterated S & H on signs.	
Dumas Milner Chevrolet San Antonio, Texas	CX 254-256			41 Found no violation on recheck.	
Tifton Jewellers, Savin Jewelry Co., Bridgeport, Conn.	CX 257-270			56-58 Injunction secured.	S & H wrote C & D letter. Said rep. several stamp companies (CX 258). Partner of firm secured injunction for S & S stamps. Apparently also rep. 1st Div. Corp. though St. 10 in letter to Joyce had not made contact.
Buchanan Stamp Exchange Buchanan, N.Y.	CX 272-274			33 Agreed not to adv. S & H stamps	Attorney warned would reshop.
John & Al Exchange Service Largo, Fla.	CX 274-285			34 Agreed to stop	Recheck ordered. Cpl. 75.
Trading Post Huntington Park, Cal.	CX 286-289			35 Agreed to stop	Recheck ordered—Negative report.
Kern's Trading Stamp Exchange Russellville, Ark.	CX 290-291				
Fear-Brown Jewelry and Camera Store, Memphis, Tenn.	CX 292-295				
Rancho Cleaners Rialto, Cal.	CX 296-302			36 Counsel reluctantly agreed to stop.	Local counsel's letter shows collaboration w/T.V. counsel (CX 293).
Trading Stamp Exchange Los Angeles, Calif.	CX 303-311			37 Ceased activity	Note original petition of exchange. Cpl. 74.
Caplan's Dept. Store Elliott City, Md.	CX 616	Caplan (2512-2558 2903)		38 Agreed to stop.	Note special form of Power of Attorney Cpl. 77
Freeman's Dept. Store Nazareth, Pa.		Freeman (2728, 2755-56 2812)			Cpl. 77

United States of America Before Federal Trade
Commission

Commissioners Paul Rand Dixon, Chairman, Philip
Elman, Everette MacIntyre, Mary Gardiner Jones,
James M. Nicholson

Docket No. 8671

In the Matter of

THE SPERRY AND HUTCHINSON COMPANY, A
CORPORATION

Opinion of the Commission

By MACINTYRE, Commissioner: The complaint herein charges The Sperry and Hutchinson Company (S&H) with violations of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), in connection with its trading stamp business. The charges are in three counts. The first has to do with S&H's policy of requiring retail dealers which it licenses to deal in its stamps (licensees) by agreement and otherwise to dispense no more than one trading stamp for each ten cents worth of goods or services sold. The second is a conspiracy charge and it alleges that respondent, in combination with others, engaged in practices directed to preventing the dispensing by retailers of more than one stamp for each ten-cent purchase. The third and final count charges that respondent, alone or in combination with others, engaged in a practice or policy to prevent or suppress the operation of trading stamp exchanges and other free and open redemption of trading stamps.

A hearing was held in this matter before an examiner. He filed his initial decision on February 10, 1967, and therein he found and concluded that the charges

were in part sustained by the evidence and in part unsupported. In general, the examiner held that the charges having to do with combinations or conspiracies between respondent and other trading stamp companies and actions taken at the behest of retailers to enforce the restrictive policies alleged were sustained, but those as to other actions concerning respondent's relationships with its dealers on the same policies were not. He issued an order to cease and desist as to those charges which he found supported by the evidence.

Both parties have appealed. Complaint counsel appeal from the initial decision to the extent the examiner did not find the complaint charges sustained and respondent appeals to the extent the examiner found violations and prohibited such by a cease and desist order. The grounds for the respective appeals of the parties will be covered in detail below.

Respondent and the Trading Stamp Business. Respondent is a corporation, organized and existing under the laws of the State of New Jersey. It has its principal office and place of business at 330 Madison Avenue, New York, New York, and it is, and has been since 1896 (incorporated in 1900), engaged in the trading stamp business. Respondent is both the oldest and the largest company in this field in the United States.

In the conduct of its trading stamp business respondent issues, for a valuable consideration, pads of trading stamps to retailers pursuant to license agreements. These agreements are generally entered into for a period of one year, although some are for longer periods. The licensee pays the respondent an amount

based upon the number of stamps distributed by the licensee. The average price in 1966 was \$2.23 for 1000 stamps, which works out to \$2.68 per book of 1200 (which is the size of the books issued by S&H). The rates charged for licensing decrease as the volume of usage increases. For retailers in certain categories who reach a particular annual volume of stamp distribution, respondent guarantees that the cost will not exceed 2 percent of the retailers' sales.

The licensee, under the agreement with S&H, promises to advertise the use of S&H green stamps and to furnish his customers with stamp-saver books and catalogs displaying redemption merchandise supplied by the respondent. He also agrees to offer stamps on each purchase at the rate of one stamp for each ten cents paid. The license agreement contains a provision which states that the title to the stamps is to remain in the respondent.

For its part, respondent agrees to maintain, and it does maintain, redemption stores where the consuming public may exchange or redeem their stamps for merchandise. Respondent also engages in other activities intended to encourage the use of S&H trading stamps and to promote the interests of its licensees, such as national advertising.

Respondent emphasizes in its business the creation of a "family" of merchants. Thus, in a particular market like a shopping center, it licenses a so-called "key account," which account will usually be a retail food chain outlet. Respondent will also license in such market other independent and usually smaller retailers such as a drug store, a cleaning establishment, a gasoline station and similar outlets. These

are referred to as "associate" accounts. Generally respondent will not license in the same market retailers competing in the same product or service, although there are exceptions.

Respondent is a firm of substantial size. It is also the foremost trading stamp company in the United States and the only one operating on a nationwide basis.¹ Respondent's annual gross receipts are over \$300 million. It issues between 37 percent and 40 percent of all trading stamps in the United States. The number of retailers licensed by respondent to use its trading stamps approximates 55,000, encompassing some 70,000 outlets. Respondent maintains over 850 redemption centers and in 1965 it distributed approximately 32 million copies of its catalogs. More than 35 million American households save S&H stamps.

It is clear that respondent is widely engaged in interstate commerce and that its acts and practices challenged in the complaint are engaged in "in commerce."

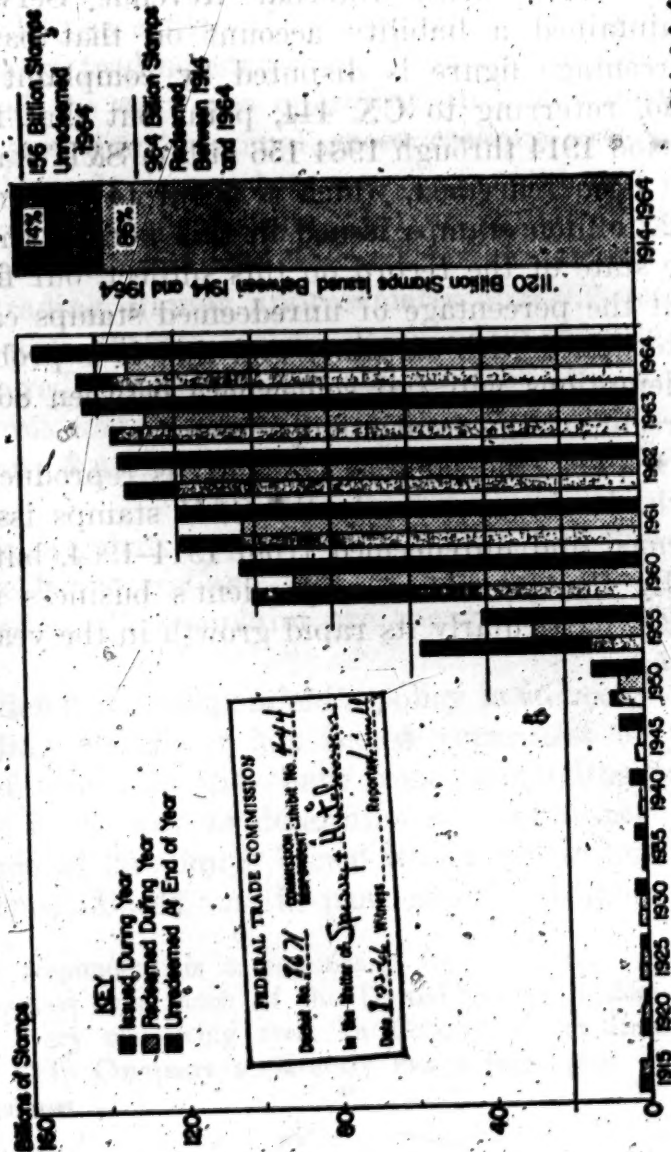
On redemption, respondent's policy is to accept all the trading stamps it has issued regardless of the length of time that they have been outstanding and, so, there is no way to determine with certainty the percentage of its stamps issued which will ultimately be returned. Based on its past records, respondent

¹ While respondent is a significant factor in the trading stamp business over much of the United States, it does not dominate every marketing area. In California, for instance, the Blue Chip Company apparently has a large part of the stamp business.

estimates that 95 percent of all stamps issued by it will be redeemed and, accordingly, for more than 40 years it has kept its financial records, filed its income tax returns with Internal Revenue Service, and maintained a liability account on that basis. This percentage figure is disputed by complaint counsel, who, referring to CX 444, point out that from the period 1914 through 1964 156 billion S&H stamps had not been redeemed, which is about 14 percent of the 1120 billion stamps issued in this period. In view of the state of the record on this subject, our finding is that the percentage of unredeemed stamps cannot be determined with certainty and that it is probable the redemptions will fall somewhere between 86 and 95 percent of the total stamps issued.

CX 444 (the same as CX 440) is reproduced herewith. It shows not only the S&H stamps issued, redeemed and unredeemed from 1914-1964, but graphically the growth of respondent's business in these years, particularly its rapid growth in the years since 1955.

S & H STAMPS ISSUED, REDEEMED, AND UNREDEEMED: 1914 - 1964



Source: CX391

CX 444

Other leading trading stamp companies in the business include Top Value Enterprises, Inc., Gold Bond Stamp Company, E. F. MacDonald Stamp Company, King Korn Stamp Company and the Blue Chip Company. The six largest companies in 1964 represented between 83 percent and 88 percent of the industry.

A great boom in the use of trading stamps began in the food retailing field about 1950. (See chart—CX 444—reproduced above). From that year to 1962 the share of retail grocery store sales made by stores using trading stamps increased from 1 percent to 47 percent (although it later declined to 43 percent) and most of the increase involved the use of trading stamps by supermarket chains. Some of these food chains established their own trading stamp companies, e.g., Kroger Co. is associated with Top Value. In certain metropolitan markets the stores which are dispensing trading stamps account for the major proportion of the retail food business. Respondent, from 1950 to the time of the hearings, increased its sales a thousand percent and derived the majority of its revenue in the period from food stores—mainly supermarkets.

The One-for-Ten Policy. While the individual charges in the complaint will be separately considered below, the nature of the proceeding as a whole should be kept in mind. The practices, to be sure, break down into separate acts which in themselves may be found to be violations of the law as charged. However, to treat these solely as separate and nonrelated actions would give a far too fragmented view of the case. The acts and practices charged concern two distinct restrictive or restraining policies of the respondent, and it is as to these that we are here essentially concerned, whether carried out alone or in combination with others. These are (a) the policy of restricting licensees in the dispensing of trading stamps to one stamp

for each 10-cent purchase (dealt with in Counts I and II), and (b) the policy of curtailing the activities of trading stamp exchanges and otherwise restricting the free transfer of trading stamps by collectors (covered by Count III of the complaint and treated separately below).²

First, our consideration will be given to the charges on the one-for-ten policy under Counts I and II. Count I specifically alleges that respondent has, by agreements and by its actions alone and sometimes at the "behest" of other licensees, required its licensees not to dispense more than one trading stamp for each ten cents worth of goods or services purchased. The effect of such policy, it is charged, is to tamper with the price structure levels or mechanisms, or otherwise to interfere with the free play of market forces; to restrain competition between retail merchants; to induce and put together a combination among retail merchants to limit competition among them; to deprive consumers of additional trading stamps; and to unfairly deprive retailers of the opportunity to make their own business decisions. Count II alleges that respondent and other named trading stamp companies have conspired to restrain and eliminate competition and that in furtherance thereof they have engaged in certain acts and practices to fix the rate of the dispensing of stamps by retailers. These alleged acts and practices include the adoption of restrictive provisions in contracts, the enforcement or attempts to enforce such provisions, and attempts to induce and

² The hearing examiner seemed to sum up complaint counsel's case in the following sentence:

"Complaint counsel's fire is concentrated on two incidents of the business: the one stamp for 10 cents of purchase price requirement and the restriction on the use of stamps after the licensee issues them to his customer."

the inducing of licensees not to dispense more than one stamp for each ten cents of purchases. The effects on competition charged are the same as the effects set forth in Count I, except for the additional allegation of a restraint on competition among trading stamp companies.

Thus, Counts I and II deal generally with alleged restraints on retailers in connection with the dispensing of extra or multiple stamps. There are a number of variations in the ways in which extra stamps are given. For instance, there is "double stamping," which is the dispensing of two trading stamps for each ten cents worth of goods or services; "bonus stamping," which is the dispensing of extra stamps in connection with the sale of a specified item; "institutional stamping," which is the issuing of extra stamps in connection with total purchases exceeding a specified amount; and other forms of the giving of extra stamps. The term "multiple stamping" will be used herein to describe all forms of the dispensing of extra trading stamps, i.e., all dispensing other than the giving of one stamp for each ten-cent purchase.

Multiple stamping is clearly contrary to respondent's policy; on this there is no dispute.* Each licensee

* In its answer respondent responds to charges as to its policy on restricting multiple stamping in pertinent part as follows:

"Denies each and every allegation contained in paragraph 7 of the complaint except admits that for many years past the practice or policy of respondent has been to enter into, place into effect, and carry out license agreements with various retailers which provide that one of respondent's stamps will be issued to the retailer's customer for each full 10 cents worth of goods or services paid for by the customer, but for the full and complete terms of said licensing agreements respondent begs leave to refer to current and past examples of licensing agreements upon the trial of this proceeding. Respondent further alleges that, notwithstanding the terms of said licensing agreements,

expressly agrees in the licensing document to issue only one stamp for each ten-cent purchase and not to dispose of the S&H stamps in any other manner. The record shows vigorous enforcement of this policy by respondent, although neither enforcement nor compliance have been completely even and uniform. The examiner expressed the situation as follows:

Respondent's urging has been effective in some cases but not in others. * * * As a practical matter respondent often permits those licensees competing with other retailers, who issue stamps of a rival company that permits multiple stamping, to meet such competition. * * * Although there is a great deal of multiple stamping done by S & H licensees, it is and has been the policy of S & H to enforce its contract against multiple stamping. * * * [Citations omitted.] (Initial decision, p. 30.)

Elsewhere, the examiner found that some 20 percent of respondent's stamps are used in multiple stamping (initial decision, p. 57).

The Hearing Examiner's Holding on the One-for-Ten Policy. Under Counts I and II the examiner found violations (a) in the enforcement of the one-for-ten policy at the "behest" of competing retailers, and (b) in the joint actions involving respondent and competing stamp companies to seek a common adherence to the one-for-ten policy. He did not find a violation under Count I concerning respondent's actions, other than the behest situations, involving its agree-

some of its licensees have from time to time and do today issue "free stamps", "double stamps", and "bonus stamps" without special authorization or permission from respondent. Respondent further admits that it has from time to time sought to persuade licensees to refrain from such practices."

ments and relationships with its dealers. Both parties have appealed from his decision on these counts to the extent that it is adverse to their respective positions.

The examiner, in his findings on the anticompetitive effects of the one-for-ten policy, did not, in all connections, clearly distinguish between respondent's actions as charged under Count I and those taken in combination with other trading stamp companies. Further, he did not expressly eliminate respondent's Count I actions from his findings on such effects. He found the one-for-ten policy anticompetitive in its effects on: (a) the price structure, (b) retailer competition, (c) the purchasing public, (d) the freedom of the retailer, and (e) trading stamp companies (initial decision, pp. 50-52). Specifically, he held that stamps are a cash discount and, thus, that a restriction on the issuance of stamps results in a "business restriction" on the cash discount; that from the point of view of the consumer the stamps are part of the package of rights he is entitled to receive for his purchase price, and any restriction on the number he receives, *pro tanto*, has an effect in the nature of a partial price restriction; and that the impact of respondent's practices is significant, particularly in the food retailing field where price and quality competition has declined. He also found, from evidence which he stated establishes that price competition is one of the competitive responses to the original issuance of stamps, that the restrictions on the number of stamps to be issued may affect in some measure price behavior. Having found such anticompetitive effects from respondent's engaging in the one-for-ten policy, he nevertheless dismissed the complaint as to most of the respondent's Count I actions and found violations only in the conspiratorial situations involving other trading stamp companies and the so-called "behest" instances.

The hearing examiner's dismissal as to the aforesaid allegations was based on his reasoning that respondent's one-for-ten policy was necessary to define the service offered. He held that without such a restrictive policy respondent could not state the cost of the "promotional system" to the retailer; there could be no system of franchising a family of noncompetitive merchants; and licensees' customers would not know what the advertising of S&H stamps means (initial decision, p. 32). Elsewhere, the hearing examiner observed that respondent sells its service as a means of bringing customers into the licensee's store and that to permit a licensee to issue stamps at will and to redeem stamps from a person other than the licensee's customers would call upon respondent to reform its contract and remove the very incentive for the customer to go to the licensee's store. This, according to the examiner, would be "detrimental to respondent's legitimate business interest in preserving its promotional scheme" (initial decision, p. 58).⁴ He concluded that the limitations on the number of stamps to be issued and restrictions on their subsequent use are reasonable provisions delimiting the obligations that respondent undertakes by its contracts and consequently are not unreasonable restraints under the Sherman Act nor unfair acts and practices under the Federal Trade Commission Act (initial decision, p. 58).⁵ We construe the examiner's holding on this issue as, in effect, a conclusion that

⁴ The examiner, on page 32 of his initial decision, further found that the provisions in the licensing agreements relating to the number of stamps issued "are an essential definition of the service offered, are not an unreasonable restraint of trade in the unique circumstances of this industry, and do not constitute price fixing."

⁵ The question of respondent's restrictions on the subsequent use of trading stamps, such as by trading stamp exchanges, will be separately considered below.

whether or not the one-for-ten policy constitutes an undue restriction or restraint on trade, it was saved from antitrust strictures because respondent had a sound business reason or motive for its actions.* In this he erred. Such is not the rule under the Sherman Act, and so, clearly, it is not under the Federal Trade Commission Act, which is broader in its sweep. As stated in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967),

Our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations the effect upon competition in the marketplace is substantially adverse. The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved * * * (*Id.* at 375.)

Clearly the hearing examiner should have looked at more than the business purpose. He should have weighed respondent's individual conduct in the light of the facts, if any, bearing on the impairment of competition. Moreover, we believe that the examiner erred in failing to recognize that the anticompetitive effects which he found resulted from respondent's various agreements and acts as charged in Count I as well as its actions jointly with other trading stamp firms.

* Although the examiner, on page 32 of his initial decision, found that the stamp dispensing restriction was not an unreasonable restraint, he seemed to ground this finding on his holding of a good business purpose.

Contentions of the Parties on the Legality of the One-for-Ten Policy. On their appeal to the Commission complaint counsel do not rely on the *per se* approach. At pages 40-41 of their appeal brief they state that they put aside the argument that the practice is illegal *per se*—to be condemned simply on the basis of the contract itself—and assert that they rely on the record showing of the effects of the restraint on competition. Their contentions on injury in general are that multiple stamping is an important competitive tool and that respondent's restriction can result in harm to local retailers who may lose business to competitors because of it; that in the marketplace the effect of the restriction on the dispensing of stamps is similar to that resulting from resale price maintenance; and that the prevention of multiple stamping eliminates a spur to price competition, particularly in the food retailing field, which, they assert, is characterized by sluggish and oligopolistic competition.

Respondent's position on the legality of its one-for-ten policy (aside from its arguments as to the sufficiency of the evidence relating to the conspiracy allegations) is that the practice must be tested under the rule of reason. As respondent phrases it, the question is: "Was the provision adopted 'with the legitimate purpose of reasonably forwarding personal interest and developing trade,' or was it entered into 'with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce?' * * * Or, regardless of its purpose, does the one for ten have the effect of unreasonably restraining trade?" (Respondent's answering brief, p. 13.) Respondent, to support its position, cites *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1910); and *Times Picayune Pub-*

lishing Company v. United States, 345 U.S. 594 (1953); and asserts that under the criteria in these cases its one-for-ten restriction is not unlawful. These contentions will be disposed of in subsequent paragraphs.

On the merits respondent first claims the record reveals the reasons and the circumstances surrounding the use of the one-for-ten provision and demonstrates it was adopted for the legitimate business purpose of providing an effective trading stamp system. It makes the following points in this connection: (1) that respondent had to select a rate of issuance which would both attract customers and yet be low enough to make the patronage profitable to a licensee, (2) that respondent had to communicate to licensees the basis upon which its stamps were issued so that the licensee could budget its costs, (3) that respondent needed a uniform rate of issuance so that the public would know what to expect at a retail store exhibiting an S&H sign, and (4) that respondent sought to avoid asserted injury to members of groups of licensees where the attractiveness of the stamps would supposedly be reduced if one of a group dispensed more than one for ten. In its argument on the one-for-ten restriction respondent does not contend (as it does with regard to its policy of suppressing the redemption of its trading stamps) that such a restriction is an element essential to the success of the S&H system; rather, respondent argues only—as we understand its position—that it had a good, sound business purpose for doing so. Respondent, in other words, takes its stand here on the goodness of its motives—not business necessity. As we have just

¹ Respondent's position on the one-for-ten restriction contrasts with, and apparently differs from, the examiner's holding, which is to the effect that the policy is "an essential definition of the service offered." (Initial decision, p. 32.)

indicated, however, assuming nonpredatory motives and valid business purposes, our inquiry cannot stop there; we need to look further at competitive effects.

Respondent also argues as to the one-for-ten restriction that complaint counsel have proved no actual anticompetitive effects, nor that the restriction must necessarily result in such effects. On this, respondent avers it is not enough that the restriction might or could have anticompetitive effects; it asserts the rule is the showing must be that the restraint must necessarily result in such effects. For this proposition respondent relies on *Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563 (1925).

The Federal Trade Commission Act and Its Application to the Practices Alleged. The trading stamp business concerns a tripartite arrangement involving (a) the stamp company issuing the stamps, (b) the dispensing retailer, and (c) the collector of the stamps. Cases in the courts have frequently raised issues as to the contract and property rights of participants in the scheme and in resolving these issues some of the courts have ruled as to the nature of trading stamps. In *Sperry and Hutchinson Co. v. Hertzberg*, 60 Atl. 368 (C.Ch. N.J. 1905), for instance, the court stated: "The thing of value which the collector pays for and acquires and has a right to transfer is not the piece of paper and the ink thereon which constitute physically the trading stamp, but the absolute property right which the stamp represents and evidences, which counsel for the complainant accurately refers to as a chose action." *Id.* at 370. The court further observed that "The trading stamp scheme is complex, and is based upon a large number of legal and equitable principles relating to the law of personal property, the law of contracts, the law of estoppel. The scheme has been

adjusted with care, so as to gain the full advantage of the binding force of these principles of jurisprudence * * *” (*Id.* at 373.)

Here, in considering the application of the Federal Trade Commission Act, the Commission’s purpose, whatever the rights and obligations of the participants to the scheme and others may be, is simply to determine, in light of the public interest, whether or not the practices as alleged are unfair within the meaning of Section 5 of such Act, which states in part:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

It can be stated at the outset that the “unfair” methods, acts and practices referred to are not limited to violations of the Sherman Act, as respondent’s argument appears to suggest. See *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 694 (1948). The United States Supreme Court has expressed its views on the scope of Section 5 of the Federal Trade Commission Act a number of times in recent cases, and there is no doubt whatsoever as to the broad reach of this law. In *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367 (1965), the Court stated:

In a broad delegation of power it [Section 5, Federal Trade Commission Act] empowers the Commission, in the first instance, to deter-

* In the *Hertzberg* case the court also stated that “Men who devise novel schemes of transacting business in order to make money cannot have the courts create novel rules of law for the protection of such schemes.” (60 Atl. 373.) See, in addition, *Sperry & Hutchinson Co. v. Mechanics’ Clothing Co.*, 135 Fed. 833 (C.C.D. R.I. 1904); *Sperry & Hutchinson Co. v. Hertzberg*, 60 Atl. 368 (C.Ch. N.J. 1905); and *Rance v. Sperry & Hutchinson Company*, Okla. 410 P. 2d 859 (1965).

mine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term "unfair" to the Commission rather than attempting to define "the many and variable unfair practices which prevail in commerce."

Later, in the *Brown Shoe* case, the Supreme Court reaffirmed this position and held that the Commission has broad powers to declare trade practices unfair and that "[t]his broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." (Emphasis supplied.) *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). In both the *Atlantic* and the *Brown* cases the Court clearly indicated that the Commission, in applying Section 5, was not bound to the criteria of the antitrust laws. For instance, in *Atlantic Refining* it stated in part:

As our cases hold, all that is necessary in § 5 proceedings to find a violation is to discover conduct that "runs counter to the public policy declared in the" Act. * * * But this is of necessity, and was intended to be, a standard to which the Commission would give substance. In doing so, its use as a guideline of recognized violations of the antitrust laws was, we believe, entirely appropriate. It has been long recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations. (Emphasis supplied.) (381 U.S. 369.)

The position of the Court on this question is perhaps even more explicitly set out in *Brown*, where it states

that the Commission, in declaring the franchise program to be unfair did not have to prove that its effect "may be to substantially lessen competition or tend to create a monopoly," as would be required under Section 3 of the Clayton Act. The reason, the Court said, is that the Commission has the power, under Section 5, to arrest trade restraints in their incipency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws. See also the recent decision in *Luria Brothers and Company, Inc. v. Federal Trade Commission*, — F.2d — (3d Cir. 1968).

Thus, it is clear that the Commission, in determining here whether or not the practices challenged in the complaint are unfair, may find a violation of the Act without a showing of such anticompetitive effects as would be required under the antitrust laws. However, we will by no means apply a mechanical application of the law to the facts. As in the *Atlantic Refining* case, *supra*, we believe it is desirable to look at all the facts of record to determine if competitive activity has been or may be impaired. In this connection, we reject respondent's contention that we must use the criteria of the Sherman Act set forth in the cases they have cited and above referred to in order to find a practice to be unfair. Respondent's reliance on *Maple Flooring, supra*, and other cases adverted to, is misplaced. These all involve rulings under the Sherman Act which are not controlling in a Federal Trade Commission Act proceeding. We will look to comparable statutes, if any, for guidance, but not as to establishing essential criteria for a finding of a violation of the practices here challenged.

Competitive Effects of the One-for-Ten Practice. Respondent is widely engaged in interstate commerce

and the commerce involved is substantial. The broad scope of the use of trading stamps has already been mentioned. Thirty-five million American households save trading stamps. Respondent alone licenses approximately 55,000 retail businesses, which distribute S&H stamps to over 70,000 retail outlets throughout the United States. Respondent's gross annual receipts alone are over \$300 million. Respondent's restrictive policies challenged in this complaint affect a large part of such commerce.

The impact of the use of trading stamps is particularly marked in the retail food business, where from 1950 to 1962 the share of retail grocery sales made by stores using trading stamps increased from 1 to 47 percent. In many metropolitan areas stamp-dispensing supermarkets account for a major portion of the retail food business in such areas. Furthermore, the stamp-dispensing retailers include all the topmost supermarket chains in the United States (though they all do not use stamps in every market in which they do business), namely, Atlantic & Pacific Tea Co., Safeway, Kroger Co., National Tea, Loblaw, Colonial, Jewel, Winn Dixie, Acme, Allied, Grand Union, and First National. Food stores using trading stamps embraced 46 percent of all food retailing in the United States in 1964.

The use of trading stamps provides a form or means of competitive rivalry at the retail level.* The scope

* Respondent's witness Dr. Beem testified to the effect that not all customers are similarly attracted by the dispensing of trading stamps. We see no particular relevance, however, in the fact that trading stamps may not exert an equal pull on all customers. It is sufficient, we believe, that a large majority of American households, as indicated above, save trading stamps and to some extent mold their shopping decisions on the basis of the availability of such stamps.

of their use and influence in retail marketing is clear from the facts stated in the paragraphs above. Other factors affecting retail competition include ~~price~~ attractiveness of store, convenience of location, parking lots, selections and variety of stock and like considerations. Additionally, in promoting goods, continuity plans are widely used, e.g., encyclopedias—a volume at a time; games, such as a variation on Bingo and the like. Trading stamps, of all of these, are in a special class because of their versatility and price-like nature and, at least under certain conditions, may rank next to price in importance.

Trading stamps affect price behavior. The examiner found, as heretofore mentioned, that price-cutting was one of the competitive responses to the original issuance of stamps; that a restriction on the giving of stamps may affect the prices of the competitor of the stamp-issuing retailer and thus the price offers in the market; and that, accordingly, the restrictions on the number of stamps to be issued may affect, in some measure, price behavior (initial decision, pp. 50-51). Dr. Phillips, respondent's witness, testified that at least at one time during the period of the adoption of trading stamps by their competitors, Safeway and Atlantic & Pacific Tea Company reacted by reducing prices. Other evidence in the record, including the testimony of retailers, clearly brings out the fact that an effective response to the issuing of trading stamps is the lowering of prices. As an example, the manager of W. T. Grant Company store in Chelmsford, Massachusetts, testified that he ran sales and cut prices to meet the competition of double stamps. Other instances are documented in the record. Consequently, we find that trading stamps have an effect upon price behavior and that in view of the universality and wide-

spread use of trading stamps this effect was and is substantial.

In the retail food industry there is evidence that historically, as price competition intensifies, the use of promotions and other forms of nonprice competition decreases, and vice versa. RXs 24 (a)-(o), which include certain testimony of Willard F. Mueller, Director of the Bureau of Economics, Federal Trade Commission, before the National Commission on Food Marketing (May 5, 1965), convey this idea. We quote in pertinent part from such testimony:

* * * Writing in TNEC Monograph 35, A. C. Hoffman, now a vice president of Kraft Foods, concluded:

During their period of rapid expansion, the chains almost without exception had an aggressive price policy calculated to bring new customers into their stores and expand their business. But close observers were able to note late in the decade of the 1920's that the chains were placing less emphasis on the price appeal and were giving less attention than formerly to methods for reducing retail costs. Competition had begun to take the form of institutional advertising and more elegant store buildings and equipment.

The introduction of the supermarket by independent retailers in the early 1930's reversed for nearly two decades the trend observed by Hoffman. Price competition was intensified

* * *

* * * By the early 1950's the 4 or 8 largest retailers in most cities accounted for well over half of all grocery-store sales. This oligopolistic market setting encouraged large retailers to de-emphasize price competition, which had proved

so effective with smaller stores. They turned increasingly to nonprice rivalry. Many turned to trading stamps. Some placed increasing emphasis on advertising and other promotion techniques. And nearly all turned to more modern, fancier supermarkets, in-store facilities and parking lots as a way of attracting customers.
* * * (RX 24 (1)-(m).)

Dr. Stewart Lee, testifying for complaint counsel, referred to the shift from price to stamp competition as follows:

Another important aspect, and this is one of the areas that disturbs me very much both as an economist and particularly as one whose area of special interest is consumer economics and consumer welfare, and that is in the last decade we have tended to see somewhat of a diminution of price competition, particularly in food sales.

Now, if you have a diminution in price competition in food sales, then the competition needs other competitive devices to bring in and there is no question they have brought in trading stamps. So the type of competition has been shifting from price competition to trading stamp competition. (Tr. 4053.)

Thus, it can be seen that price competition and stamp competition are importantly related in the marketplace. Moreover, it is clear that there is an intermingling in the two forms of competition and that stamp competition may, in some circumstances, substitute for price competition at the retail level.

The versatility and importance of trading stamps as a competitive factor is demonstrated by the number of ways in which they can be used as a sales incentive. Dr. Lee, on this subject, testified in part:

Price competition has a great degree of flexibility in its use. You can move in quickly. You can adjust prices, you can adjust prices in different ways as was testified to. Trading stamps could be used and have been used very closely with the degree of flexibility, with multiple stamping of various types on certain items, and this is one of the very important aspects of it. (Tr. 4052-53.)

Dr. Beem testified that it is easier to establish a specific value for the trading stamp than it is for many other kinds of nonprice competition and "that in that sense the trading stamp is, you might say, price-like" (tr. 6057).¹⁰ Multiple stamps (including double, bonus or institutional) have been used in various ways as a competitive device. They have been used to sell specific products, to increase store traffic, to promote store openings, to meet the store openings of competitors, to shift patronage from regular "shopping days" to

¹⁰ Dr. Beem also agreed with the following question, which was taken from his writings:

"By Mr. Stern:

"Q. A way in which trading stamps has has [sic] helped to make competition more effective is by offering another dimension in which competition can be expressed. There are many instances, for example, in which market structures make effective price competition unlikely. To make a price concession feasible, a seller must secure enough additional sales to offset the lower profit per unit of sales. When there are only a few sellers in a market, and where costs among competing sellers is comparable, price reductions are subject to rapid neutralization through imitation. In these frequently occurring situations trading stamps offer a feasible way to make a price-like concession because they cannot easily or immediately be offset by imitation.

"Now, I ask you if you agree with that statement?

"A. I not only agree with it, but I wrote it." (Tr. 6435.)

another day, and to overcome impediments like poor location and special merchandising problems.

This record also shows that in addition to lowering prices a retailer's response to a competitor's introduction of stamps may be the use of trading stamps, including the issuance of multiple stamps. The situation which developed in Denver in 1953, covered in more detail in the conspiracy discussion to follow, is a classic example of the use of multiple stamps to meet stamp competition. In that instance the use of trading stamps had been met by competitors by the dispensing of double, and, in turn, triple stamps, and even quadruple stamps. This competition in the dispensing of multiple stamps finally reached the point where the various stamp companies operating in the market entered into an agreement that they would adhere to a policy of dispensing only one for ten.

The importance of stamp competition possibly is in no way better shown than by the evidence of complaints from licensees against other competing licensees on the use of double stamps. Such evidence demonstrates not only the existence of trading stamp competition but that such a form of competition is effective. Appendix A of the initial decision, incorporated into the Commission's findings, contains a listing of various instances documented in the file of complaints from licensees as to such multiple stamp competition.

An example is a situation which developed in Bristol, Connecticut, in 1958. In that year three food stores—Mott's Washington Superette, and Petit's—all dispensed S&H stamps in their Bristol, Connecticut outlets. Petit's and Washington Superette began offering double S&H stamps. Mott's demanded that respondent stop such practice. There followed a series

of efforts by respondent to eliminate the double stamping. This included submitting to Washington Superette and Petit's an advertisement to be run jointly, stating that double S&H stamps would not be given by those stores, although it is not clear that such an advertisement was published. The efforts on the part of the respondent to stop this multiple stamping were unsuccessful in the beginning, and apparently it was only after a period of time and a number of contacts by the respondent that the retailers discontinued the practice. As to this and other similar situations disclosed in the record, the showing of the tenacity with which such retailers stick to and continue double stamping suggests the effectiveness of this form of competition.

Respondent's own policy leaves no doubt as to the potency of stamp competition. In enforcing its one-for-ten restriction respondent does not require licensees competing with multiple stamping retailers licensed by other companies to discontinue the dispensing of multiple stamps. Respondent's vice president, Frank Rossi, testified in part as follows as to its policy:

* * * And when a rival trading stamp company permits its licensees to use multiple stamps, for us to deny our merchants the right to issue multiple stamps would put him at a considerable disadvantage. And so, whether we like it or not, we have got to go along with it because the competitive situation is such that we must do this to protect our interest and that of our licensees. (Tr. 4986-87.)

The retention of this power by the respondent—the power to decide which retailer will use a certain competitive tool and which will not—cogently reveals the inherent evil in the restraint imposed.

The testimony of retailers further shows the impact of trading stamps on competition at this level. David Javitch, president of Carlisle Food and Giant Foods, Inc., Carlisle, Pennsylvania, testified that the advertised prices of his stores in Mechanicsburg were lower than the prices of his stores in Carlisle to overcome the double-stamp situation occurring in the former area. Henry Vandevoort, operator of Van's Food Market in Pella, Iowa, testified that he used multiple stamps to combat competition in his area. He further testified that when Van's Food Market in Pella was required to give up double stamps, the store lost business. Samuel P. Alterman, executive vice president of Alterman Foods, Atlanta, Georgia, testified that one of his competitors started double stamping and that in his opinion this was partly in response to his own price cutting. He stated:

Well, we were fighting for existence. We were fighting with prices. (Tr. 6986-87.)

Bernard Weindruch, who was connected with Eagle Stores of Rock Island, Illinois, asserted in his testimony that in December 1961 Park's Discount Department Store and Discount Food Store completely demoralized the entire marketing area with price cutting and that Eagle Markets had decided to try double stamps to see if they could generate enough volume, rather than resort to "drastic price cutting." (Tr. 7007.) These are examples, among others, of the testimony of retailers as to the competitive effects of multiple stamping in the retailing of food.

It is also apparent from grocery store advertisements included in the record that the use of trading stamps rivals price itself as an inducement to patronage. In many of the advertisements the assertions as to price and the offering as to trading stamps appear

to be given about equal prominence (some examples are CXs 69-76, 106, 107, 126-27, and others). Many of these advertisements offer extra or bonus trading stamps on the purchase of specific items therein listed.

Respondent's own advertisement, which appeared in such publications as *Business Week*, *The New York Times*, and others, possibly summarizes the impact of trading stamps upon competition in food retailing as well as any other single item of evidence. It states in part:

When a leading research organization recently made a national survey among the managers of 541 supermarkets that do not give stamps, they found that more than half of them (51.5%) had reduced prices to compete with stamps.

The article concluded: "* * * it seems we need more and more competitive forces, like trading stamps, in the marketplace" (CX 196).

In holding here as we do, that trading stamps are in themselves a competitive force or factor, it is unnecessary to make a conclusive determination, as complaint counsel appear to urge, that trading stamps are, in effect, a discount from price. Nevertheless, we believe that some comment on this particular phase of the matter is justified because the competitive significance of trading stamps is traceable at least in part to its price-like behavior. Trading stamps, of course, are in one sense only an incident to the sale transaction and, in this respect, something like a cash discount. The price of the article on which the stamps are given can fluctuate independently of the stamps and to the extent stamps are

a discount from price, it is a discount only from the otherwise established price of the article.

In this light, at least, the dispensing of trading stamps by the retailer can be considered a price reduction from the retailer's regular prices. That would seem to be the result particularly in the States which require redemption be made in cash, such as Wisconsin and Wyoming, as well as in the sixteen States in which the consumer has the option of redeeming trading stamps in cash.

Also, it is noted that in some States, in applying fair trade laws, the giving of trading stamps has been held to constitute a reduction in the price of the goods. See, for example, *Hogue v. Kroger Co.*, Tenn. Sup. Ct., 1963 CCH Trade Cas. ¶70962, where the court stated:

The stamps have the effect of reducing the price whether called advertising gimmicks, discounts for cash payment, etc., or not * * * (P. 78822.)

See also *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 148 N.E. 2d 861 (1958). While other courts in fair trade law decisions have held to the effect that trading stamps constitute a discount for cash (and therefore supposedly not a reduction in price), even in this respect the stamps have a clear relationship to price.¹¹

Respondent's contention on the subject is that the dispensing of trading stamps by retailers is a promotional service similar to such other services as the

¹¹ See, for example, *Safeway Stores v. Oklahoma Retail Grocers Association*, 322 P.2d 179 (1958), *aff'd*, 360 U.S. 334 (1959). The court held in this case that trading stamps merely constituted a discount from cash.

furnishing of a parking lot and thus that it is not a discount from price but a cost item to the retailer.¹² While the dispensing of trading stamps, in some circumstances at least, appears to be in effect a price reduction, as stated, we need not make a conclusive finding on this one way or the other. The scheme, one court has observed, is *sui generis*. *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 833 (C.C. D.R.I. 1904). On the circumstances, we are of the view that the application of any *per se* or mechanical rules of law would be inappropriate. Moreover, even a determination (which we do not make) that the dispensing of trading stamps is not a reduction in price but the giving of a service to a customer would not dispose of the proceeding. The Federal Trade Commission Act's proscription against unfair practices is broad enough to cover restrictions in the services which retailers may offer. Cf. *Fashion Originators Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941), a case involving a restriction on competition in the nonprice area, i.e., collective action to destroy competition in the sale of copied garments.

Our decision rests not on resolving the issue of whether or not the trading stamp is a discount from or a reduction in price in the guise of a stamp program, but on the determination that the trading stamp scheme is itself a viable means of competition at the retail level, particularly in the distribution of food. Trading stamps are not just a temporary phenomena,

¹² The examiner found at one point as follows:

"From an accounting or economic point of view, it may be said that the stamps are not part of the cost of sales of the merchandise but rather part of the overhead of the business. From the point of view of the consumer, however, the stamps are part of the package of rights that he is entitled to receive for his purchase price." (Initial decision, p. 50.)

to disappear with changes in marketing approaches or purchasing habits, like so much frost under an October sun. Their use—going back some seventy years—has stood the rigorous test of time. Nor are they just another promotional scheme or gimmick, as respondent contends; they have become an integral and important part of retailing in America.

We note, moreover, that the trading stamp industry is highly concentrated (only a few of the companies have any significant share of the business), and it is dominated by the respondent, who wields great power over its licensees.¹³ It is in this environment that we view the competitive effects of respondent's restraints.

On the desirability of the use of stamp competition in place of price competition we make no finding either way; we only recognize, looking at the record before us, that such competition does exist; that it is substantial; and that, in the circumstances, it is worth preserving against limitations and restraints.

There is no showing that respondent's conduct relative to its dealers as charged under Count I is in any way necessary for the preservation or promotion of competition; the evidence is just the reverse. It is

¹³ While there are other trading stamp companies in the business to which a retailer could turn, in many markets in which respondent's S&H stamp is highly prized such an option, as a practical matter, is not available. On this Dr. Lee testified as follows:

"S&H is so dominant in the marketplace that a retailer wants to give a trading stamp that has a high degree of acceptability and with 39 percent of the consumers preferring S&H, a retailer wants to be very cautious, if he is going to introduce a trading stamp, he would like one they prefer. If he has the one they prefer, he wants to keep it. So that in the marketplace, the dominant size makes it a very valuable competitive device; either he wants to get to use it or he wants to continue to use it, if he has it." (Tr. 4055.)

clear, we believe, from the discussion in preceding paragraphs under the subject of "competitive effects," that respondent's one-for-ten policy, by limiting retailers' opportunities to compete, has substantially impaired or may substantially impair competition.

The scheme is closely analogous to the practices involved in cases dealing with resale price maintenance and the organizing of price maintenance combinations. See *Dr. Miles Medical Co. v. John D. Parke & Sons Co.*, 220 U.S. 373 (1911); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922). Here the respondent, to the extent that it entered into individual agreements on a vertical plane with various retailers and instituted, as part of its plan, the one-for-ten restriction, engaged in a practice restraining trade in much the same way as if it had entered into agreements with such dealers bearing specifically on the prices of the products they sold.

There is a further aspect to the matter concerning the so-called "behest" situations. The hearing examiner found that in a substantial number of instances involving several sections of the United States licensees of respondent requested it to urge other retail licensees in competition with them to cease issuing multiple stamps; and that respondent urged such competing licensees so to stop (initial decision, p. 33). Respondent, in paragraph 8 of its answer, admits that from time to time it has attempted to secure adherence by its licensees—sometimes after complaints were made by other licensees of respondent—to abide by the one-for-ten policy.¹⁴ The examiner found that

¹⁴ Paragraph 8 of respondent's answer reads in part as follows:

"* * * except admits that from time to time it has attempted to secure adherence by its licensees, sometimes after

respondent's actions varied from case to case; that in some instances a threat to cancel was made and that in other instances a mild request was deemed sufficient. The examiner further found that in most instances the noncomplying retailer agreed to comply, even though he later lapsed into noncompliance. The examiner concluded as to such "behest" situations that the action tends to become a combination and unreasonable restraint of trade and thus violates Section 5 of the Federal Trade Commission Act. The hearing examiner, to support his holding, relies on *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Parke, Davis & Co.*, *supra*; and *Federal Trade Commission v. Beech-Nut Packing Co.*, *supra*.

Respondent, as to these "behest" situations, argues that the cases relied upon by the examiner are inapposite because the *General Motors* matter involved a conspiracy and *Parke, Davis* and *Beech-Nut* went beyond the unilateral enforcement of the resale pricing policy involved. It claims that no combination of the 70,000 licensees existed and that respondent "simply acted, by itself, to enforce its contracts after receiving unsolicited information from isolated licensees having no relation with each other" (respondent's appeal brief, p. 20). Thus, respondent asserts, it is impossible to find a conspiracy.

We note on this that respondent entered into agreements on the one-for-ten restriction with its dealers,

complaints were made by other licensees of respondent, to the provision in respondent's license agreements that respondent's trading stamps shall be issued at the rate of one for each 10 cents worth of goods or services sold by the retailer, and that upon one occasion respondent actually cancelled a license agreement when the retailer refused to adhere to or comply with the aforesaid provision."

so that the *Beech-Nut* and *Parke, Davis* cases are relevant only to the extent they deal with organizing a combination with retailers. In *Parke, Davis*, the Court was primarily concerned with the lack of agreements between retailers and *Parke, Davis*. It resolved such issue by holding that in a vertical restraint matter no actual agreement is necessary.¹⁵ The Court there stated that if a manufacturer was unwilling to rely on individual self-interest to bring about general voluntary acquiescence in the scheme and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to it, the customer's acquiescence has not been a matter of individual free choice prompted alone by the desirability of the product. The manufacturer there was the organizer of a price maintenance combination or conspiracy in violation of the Sherman Act. This case is similar in that respondent was an organizer of a combination restricting the competition involved in the dispensing of multiple trading stamps, but it did this by agreements as well as by other acts and practices.

In this matter, the best situations are not necessary to prove the Count I combination, but they do serve to illustrate that the agreements were more than a mere formality. Also, they show that enforcement was such as to involve retailer against competing retailer in league with respondent, bringing this close to a horizontal combination among retailers. Respondent, if it did not expressly solicit complaints

¹⁵ " * * * an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declaration to sell to a customer who will not observe his announced policy." (The emphasis is the Court's.) (362 U.S.

against double-stamping licensees, made clear by its actions that such were encouraged and acted upon. A few examples will be related.

In 1961, Mr. Meyer of W. T. Grant Company wrote to Mr. Clemens of the respondents in New York City, referring to an ad promoting double stamps by Sutherland's Department Store in Lawrence, Massachusetts. Mr. Meyer stated that the ad disturbed his stores, since they were told repeatedly that double stamps could only be used with permission of respondent; and that "I would appreciate confirmation, from you, that there has been no change in your policy and that promotions such as the attached, without your approval, will not be repeated" (CX 90). Subsequently, the record shows some internal correspondence between Mr. Clemens and Mr. Gardner of Sperry and Hutchinson Company. In this correspondence it is clear that Sutherland's was contacted by a Sperry and Hutchinson representative and apparently was advised of the Grant store's objection.¹⁶ Finally, on November 10, 1961, Grant's was informed by Mr. Clemens of respondent that Sutherland's did not have permission to double stamp and that "he has promised me that he would not do it again unless permission was definitely granted" (CX 94). It appears that the double stamping by Sutherland's was discontinued at least for a period of time.

Another example concerns an incident in Pennsylvania in 1960. The record contains a letter from Mr. Whitnack of Sperry and Hutchinson to the Zollinger-Harned Department Store in Allentown, Pennsylvania, reporting that he had seen the store's Founder's

¹⁶ Respondent's letter of November 7, 1961, reports that Mr. Kurth of Sutherland's "would have no objection if Grant's were also to use them" (CX93-(a)).

Day Sale, featuring double S&H stamps. Mr. Whittack objected to this, stating, "We can handle the supermarket situation all right, but in your case stores such as Miller's Department Store in Northhampton and Nelson-Freeman in Nazareth and a few other small stores in that area, have given us quite an argument about why we do not let them operate like you do" (CX 116). The responding letter from Zollinger-Harned included this statement: "The decision with respect to our continuing this double stamp event will remain entirely within your judgment. I am interested only in cooperating with Sperry and Hutchinson Co." (CX 117). Zollinger-Harned thereafter discontinued double stamping for a period of time.

Another example is the incident which occurred in Bristol, Connecticut, in 1958 (discussed above), in which two licensees gave up double stamping at the behest of a competing licensee.

These and similar situations disclosed by the record (see illustrations in Appendix A attached to initial decision and incorporated into the Commission's findings) have gone well beyond the bounds proscribed by the Supreme Court of a mere announcement of policy and a refusal to deal.¹¹ In this case, respondent entered into agreements with retailers to confine the dispensing of trading stamps to one-for-ten and it actively enforced such policy. Respondent, upon the receipt of a complaint, went to the party complained against, received an assurance to cooperate, and frequently reported this back to the complaining dealer as a means to retain the latter's adherence to its policy. Respondent used various means at its disposal to obtain compliance, including threats to cancel. This

¹¹ There is only one disclosed instance of a refusal to deal, which instance was admitted in respondent's answer (par. 8).

restrictive policy, as above found, ~~has~~ impaired or may substantially impair competition.

We hold in the circumstances that respondent's agreements with retailers on the one-for-ten restriction and its policies and actions in connection with enforcing such restriction as charged in Count I of the complaint, including the "behest" situations, were such as to organize a combination in restraint of trade in connection with the dispensing of trading stamps; that these are unfair methods of competition and unfair acts and practices; and that they are in violation of Section 5 of the Federal Trade Commission Act.

The Illegality of the Combinations to Enforce the One-for-Ten Policy. The complaint, in the conspiracy charge in Count II, alleges that respondent and other companies not named in the complaint (including Top Value Enterprises, Inc., Gold Bond Stamp Company, E. F. MacDonald Stamp Company, King Korn Stamp Company, Merchants Green Trading Stamp Company, and Stop & Save Trading Stamp Corporation) engaged in understandings or agreements, combinations or conspiracies, and pursued a common course of action and course of dealing to restrain and eliminate competition. Complaint counsel, in support of this charge, has adduced evidence concerning cooperative efforts or contacts with regard to enforcing a one-for-ten policy. The hearing examiner agreed and found that conspiracies had been entered into and included in his initial decision an order to cease and desist such practices. Respondent has appealed from this holding.

The appeal is largely a challenge of the significance of the evidence adduced. Respondent claims, for instance, that the joint activity in Denver in 1953, in which respondent and four other companies announced in a newspaper that they would thereafter

require their licensees to issue stamps at a rate of one on each ten-cent sale, is the only evidence in the record relating to joint activity by trading stamp companies and that this is old and stale. It avers that documents showing the contacts as to the one-for-ten restriction between officials of respondent and Gold Bond relate to events prior to 1962 and thus do not show a "continuing" conspiracy alleged to exist on the date of the complaint, and that none of the incidents involving Gold Bond were initiated by respondent's officials. Respondent, in sum, attacks the sufficiency of the evidence. Nowhere does it take the position that it could have lawfully combined with other trading stamp companies to fix a ratio for the dispensing of stamps.

It is clear, we believe, that respondent did combine with other stamp companies to fix a policy of dispensing one stamp with ten. This is possibly best illustrated by the Denver incident of 1953, involving respondent and Gunn Stamps, Red Stamps, Pioneer Stamps and True Blue Stamps. In that instance a meeting was held October 1, 1953, at which the stamp companies agreed to issue a joint advertisement that all firms would require an adherence to a policy of one for ten, and this advertisement subsequently appeared October 5, 1953. The advertisement, signed by the mentioned stamp companies, states in part:

The Practice of Offering Multiple Stamps is Contrary to the Policies of the Undersigned Stamp Companies. In the Interest of Both Merchant and Consumer, Beginning Today, Monday, October 5, We Will Require Adherence by All Firms, to the Policy of Giving ONE and Only ONE Stamp with Every 10¢ Purchase. (CX 147.)

Thereafter, for many years, there was little double stamping in the Denver area.

However, that is not the only incident of direct cooperative activity between respondent and another stamp company on this question. The examiner's findings (pages 35-40) discuss various other incidents. For example, in May 1961, as a result of a contact by a Gold Bond representative with personnel of the respondent, Pete's Country Store was advised that issuing double stamps was in violation of his contract and must be stopped. In another instance, in 1961, respondent was contacted by a Gold Bond representative as to double stamping by Lewis Grocery Company in Mississippi. There is evidence respondent's representative advised that the double stamping by Lewis Grocery Company would not be repeated; however, it appears that respondent's action was ineffectual.

Further, instances of combined activity between Gold Bond and respondent involved multiple stamping in the State of Iowa in 1961 and 1962 and later in 1963. In the first instance, respondent was asked by Gold Bond to stop Van's Food Market, Pella, Iowa, from double stamping. The second incident in Iowa involved Eagle Stores, respondent's licensee, and Super-Valu Stores, a Gold Bond licensee. The evidence indicates that contacts were made with respondent's representatives by Gold Bond representatives as to the double stamping by Eagle Stores, in efforts to have it stopped. Finally, there is an instance in March 1963 in which the manager of Gold Strike stamps, in Salt Lake City, Utah, complained to a representative of respondent that Prinster's City Market in Mohab, Utah, was giving double stamps. The evidence shows that Gold Strike was advised that respondent would take care of the matter.

These examples appear to be separate incidents; yet, they form a part of the larger pattern. Most of the leading stamp companies at the time of the complaint expressly provided in their contracts for the issuance of one stamp with each ten cents of purchase (though some made certain exceptions). These included National Enterprises, Inc. (Top Value) and Top Value Enterprises, Inc., E. F. MacDonald Stamp Company (Plaid), Merchants Green Trading Stamp Company, King Korn Stamp Company, Gold Bond Stamp Company, Blue Chip Company, and the respondent. These companies and others were all aware of each other's policies and, at times, as illustrated by the above situations, sought to enforce such policies by collective action. Clearly it is unnecessary that there be simultaneous action or a simultaneous agreement on the part of all the conspirators. Nor is it a defense that the scheme may not have been continuous and wholly effective. Cf. *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457, 466 (1941); *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939). The relationship here was informal and loosely connected. Nevertheless, there was an adherence to a common scheme and at certain times and places specific action taken by certain of the trading stamp companies to enforce such scheme. In the circumstances we believe there has been shown a conspiracy or conspiracies to restrain trade. We hold that these constituted unfair methods of competition and unfair acts and practices violating Section 5 of the Federal Trade Commission Act.

Charges under Count III of the Complaint. Count III of the complaint charges that respondent, by itself or in combination with others, has entered into and placed into effect a practice or policy to prevent and suppress the operation of trading stamp exchanges or

the free and open redemption of trading stamps. It is alleged that the means used include agreements with retailers, a planned common course of action or course of dealings with other trading stamp companies to exchange information and to assist in legal actions against persons engaged in such activity, and other regulating and policing activity. The complaint finally charges that the effects of such practices or policies are to suppress independent trading stamp exchanges to the detriment of the people engaged in such business or activity, and of the members of the purchasing public who are thus deprived of the facility, and to interfere with the right of the public to enjoy the full use of their personal property.

On the issues raised under Count III, dealing with alleged restraints in the redemption of stamps, the facts are not generally in dispute—at least so far as they concern respondent's unilateral acts. In its answer to the complaint respondent admits that "by itself, respondent for many years past, has entered into, placed in effect and carried out a practice or policy to prevent trading stamp exchanges from trafficking in respondent's stamps and to prevent unauthorized redemption of respondent's stamps, by means of provisions in its license agreements, by notification of intent to institute litigation and by the actual institution and conduct of such litigation" (respondent's answer, par. 16). The evidence in the record relating to respondent's efforts alone or in conjunction with others to prevent or suppress trading stamp exchanges and the free redemption of trading stamps is detailed by the examiner in the initial decision on pages 40-48. These have been specifically incorporated into the Commission's findings, to accompany this opinion.

The examiner, as he did in the policy of limiting the dispensing of stamps to one for ten, found a

violation in the combined activity of respondent with others, but no violation in respondent's individual actions. The examiner held that both restrictions challenged in the complaint were a part of the service offered. In the examiner's view, if the stamps can be freely traded, the attraction of the customer to a licensee's store, caused by the issuance of S&H stamps, is destroyed and the licensee loses what he has paid for.

Both parties have appealed from the hearing examiner's disposition of Count III of the complaint—complaint counsel for his failure to find respondent's unilateral acts unlawful, and respondent from his finding that its acts in combination with others were illegal.

The policy of alleged suppression and prevention of stamp redemption activities covered in Count III of the complaint relates not only to trading stamp exchanges but also to what the complaint refers to as "the free and open redemption of trading stamps by persons or firms desiring to enter or operate such business other than respondent." The hearing examiner found that there were three categories of persons engaged in the so-called "unauthorized" stamp redemption activity, as follows: (1) retailers who wanted to buy stamps and reissue them, (2) retailers who offered to exchange S&H stamps for those they were issuing to lure customers who collected S&H stamps into their stores, and (3) the trading stamp exchanges that ran brokerage operations (initial decision, p. 41).

On point (1), above, a comment is necessary. Re-issuance might be defined as the practice of a retailer of taking in trading stamps which have not yet been pasted into books and reissuing (or redispensing)

them on new purchases. Such a practice goes beyond merely redeeming or exchanging, which was the practice shown in this record. Trading stamp operators, including the two Rances and Mrs. DeBolt, stated that they had a definite policy against selling stamps to retail merchants. The reissuance of stamps by a retailer not licensed by the respondent is a practice concerning which there is little, if any, evidence in this record. Complaint counsel concede, at page 30 of their reply brief, that the right of respondent to prevent such a use of issued stamps is in no way involved in this proceeding. Accordingly, the Commission's order will not extend to the respondent's individual policies so far as they concern the reissuance of S&H stamps by retailers.

We will now consider the characteristics of the "trading stamp exchange." The hearing examiner, at page 6 of his initial decision, defined the trading stamp exchange as a person or business engaged in the exchange of trading stamps issued by one trading stamp company for those issued by another, or engaged in the sale or purchase of trading stamps to or from members of the consuming public. The trading stamp exchanges disclosed by the record appear to be relatively small businesses. The individuals involved simply went into business and offered to redeem or exchange trading stamps. Trading stamp businesses as to which testimony was taken include the "Trading Stamp Exchange" in Oklahoma City, Oklahoma, operated by William Rance; the "Trading Stamp Exchange" of Tulsa, Oklahoma, operated by Mrs. Regina Lou DeBolt; the "Trading Stamp Exchange" of Fort Worth, Texas, operated by Morris Sam Rance; and "Rosenwasser's," Corpus Christi, Texas, operated by Herbert Rosenwasser.

These trading stamp exchanges all seem to be similar in their mode of operation. William Rance described his operation as follows:

We buy, sell, or exchange trading stamps for, principally, our customers are housewives. If a person wants to sell trading stamps, we can buy them. If a person wants to buy a book of stamps, then we will sell him a book. Principally, most of our customers simply want to exchange one type of stamp for another, and for that we charge a commission fee, usually thirty to fifty cents a book, and that's about the extent of the services that we offer. (Tr. 1881.)

He added that about 90 percent of the income for the business was from commissions charged for the exchange of stamps (tr. 1882).

The other kind of stamp redemption activity which respondent sought to suppress and did suppress involved principally retailers who offered to exchange S&H stamps for their own variety of stamps or simply to redeem S&H stamps. The redemption activity may in some instances be carried on by S&H licensees. Generally, the stores involved are not licensees of S&H. One example involves Jake's Department Store, Thibodaux, Louisiana. In this instance the retailer offered to give \$3.00 in merchandise for each green stamp book. Respondent warned the store about this practice and the retailer agreed to discontinue it. Another example concerns Good Deal Supermarkets, Irvington, New Jersey. In 1958 this store advertised that it would accept coupons and trading stamps to be used to buy food to give to needy families. Good Deal was threatened with litigation and informed that it had no right to exchange or redeem S&H stamps.

It appears that eventually Good Deal discontinued its practice. A further example is that of the Savin Company, Inc., doing business as Tifon Jewelers in Orange, Connecticut. This firm, in 1958, offered to take in stamp books as a down payment on goods purchased but was forced to discontinue the practice by S&H.

Respondent has vigorously opposed trading stamp exchanges and all redemption of S&H stamps by persons and firms other than the respondent. This policy is set out in its answer, which was quoted in pertinent part above. First, we will give consideration to respondent's individual activities in restraining stamp redemption or exchange activity.

The stamp collector's book supplied by respondent contains a notice that the title in the stamps is reserved in the respondent and that "[t]he only right which you [the consumer] acquire in said stamps is to paste them in books like this and present them to us for redemption" (CX 401). The policy statement in the collector's book further explains that the consumer must not dispose of the stamps or make further use of them without respondent's consent in writing, that permission to transfer the stamps to any "bona fide" collector of S&H stamps will be granted and that if the books are transferred without respondent's consent the respondent reserves the right to restrain their use or take them from other parties. Also, respondent's contract with its licensees provides that title to the stamps shall remain in the respondent and shall not pass to anyone else.

In enforcing its policy of suppressing trading stamp exchanges and other outside redemption activities, respondent, since January 1, 1957, filed at least 16 complaints seeking injunctions against trading stamp exchanges or other parties engaged in redeem-

ing its stamps. Between January 1, 1957 and April 1, 1965, respondent sent approximately 140 warning letters to exchange operators dealing in S&H stamps, and approximately 175 warning letters to other kinds of firms redeeming S&H stamps. Respondent has been generally successful in suppressing the so-called unauthorized redemption of stamps. A recent court case sustaining respondent in its policy of suppressing trading stamp exchanges is *Rance v. Sperry and Hutchinson Company*, 410 P.2d 859 (Okla. Sup. Ct. 1965), *cert. denied*, 382 U.S. 945 (1965).

Complaint counsel, on this issue, argue that respondent's actions violate Section 5 of the Federal Trade Commission Act because respondent is imposing an oppressive and unjustified restriction on the consuming public, because it tends to eliminate a class of small businessmen, and because it is against the public policy of encouraging the free transfer of property. More specifically, complaint counsel contend that respondent's suppression policy is a restraint on alienation contrary to public policy; it removes a service which could reduce the economic waste of unredeemed stamps, and it eliminates a needed and unique service.

Respondent's position, so far as its individual policy is concerned, is to the effect that unrestricted "trafficking" in respondent's stamps would destroy the franchise system by removing the incentive for stamp savers to return to S&H licensees. This would eliminate, it is claimed, the very consideration for which licensees are paying under the franchise. Respondent otherwise asserts that the essential elements to the success of the S&H system (*i.e.*, the exclusive license, full book requirement, the "remembrance value" of S&H merchandise, and exposure of the consumer to respondent's attractive redemption cen-

ters) are frustrated and impaired by the so-called unauthorized redemption activities.

Respondent does not seem to argue that its policy of suppression of trading stamp exchanges and other outside redemption of stamps rests on technical legal principles such as a reservation of title. Rather, it argues that redemption operations by others are an interference for commercial purposes with the normal operations of its business in a manner depriving it of the full benefit of its own expenditure of time, money and labor, and unjustly appropriates that benefit to another. Thus, it asserts trading stamp exchanges and others dealing in its stamps interfere with and reduce the value of respondent's exclusive license agreements, while at the same time capitalizing for their own profit, on respondent's efforts to create a valuable promotional system for its licensees. Respondent refers particularly to *Sperry & Hutchinson Co. v. Lewis Weber Co.*, 161 Fed. 219 (N.D. Ill. 1908).

Respondent, to support its position that in suppressing outside redemption of its stamps it acted in good faith to protect its business interests, adduced testimony from its own officers and employees, who testified in broad generalities that harm would come to respondent's system by the indiscriminate redemption. They offered no hard facts, however, to support their assertions on the issue. On this question, we note that trading stamp exchanges and other redemption activities have been so regularly suppressed that there is little evidence to show what would be the effect if such operations were continued over a period of time. In the Oklahoma-Texas area where trading stamp exchanges did do business with some regularity before their operations were curtailed (principally through respondent's actions), the evidence seems to

indicate, if anything, an increase in respondent's business.¹⁸

Furthermore, there is a great deal of exchanging of stamps between individuals. There is evidence, for instance, that in 1960 some 20 percent of the stamps issued were exchanged by housewives on an informal basis. Such exchanges are permitted by the respondent when authorization is requested. There is no evidence that such exchanges have been damaging to respondent's business, that is, that they discourage consumers from shopping at S&H licensees. It is not clear why the effect should be any different where the exchange is made through a commercial exchange.

Additionally, it has been the policy of respondent to encourage the pooling of stamps for charitable reasons. An example of this is where a church organization decides to acquire a school bus with trading stamps. In such an instance some of the various elements which respondent claims are essential to the effective operation of its business, i.e., remembrance value, attractive redemption stores, completed books, etc., would appear to be reduced or eliminated. This seems to illustrate that motivations other than those listed can act as incentives for the housewife to acquire S&H trading stamps and therefore to shop S&H licensee stores.

It is clear, we believe, upon a more general basis, that respondent's business would not be seriously affected by the operation of trading stamp exchanges. In most areas the S&H trading stamp is the most popular and sought after. If the trading stamp exchange has a supply of the S&H stamps, this would necessarily mean that individuals in the market have

¹⁸ For example, respondent's Fort Worth warehouse facility serving such area was doubled in 1964, suggesting an increase of business.

patronized S&H licensees to obtain them and to in turn supply the exchange. Furthermore, even if exchanges existed on a broader scale, many people who now exchange books among themselves would probably continue to do so to avoid the fees charged and the inconvenience which might be involved. To summarize, we do not think that the examiner's finding to the effect that respondent's business would be harmed by free and open redemption of its trading stamps is justified by the evidence in this record. In short, there is no business justification shown for the restraint imposed.¹⁹ However, as we have heretofore indicated, even if respondent could have shown a good business reason for the suppression of stamp redemption activity, its actions would still have to be weighed in terms of their possible harm to competition. *United States v. Arnold, Schwinn & Co., supra*. We will therefore look at the competitive effects of the practice.

Before covering such effects, however, some mention should be made of complaint counsel's argument in substance that respondent's restrictions on the transfer of S&H stamps constitutes a restraint on alienation and that this is contrary to public policy. We do not understand that respondent is pressing an argument—at least on this appeal—that its actions are justified by the right of ownership. Quite to the contrary, respondent appears to argue that reasons other than “reservation of title or any other matter

¹⁹ The cases cited by respondent, in which the courts have enforced restrictions placed on the transfer of railroad and amusement tickets, involve public interest considerations such as rate regulation and abuses of ticket speculation. There are no such considerations in this case. See *Betterman v. Louisville & Nashville RR. Co.*, 207 U.S. 205 (1907); *Collister v. Hayman*, 76 N.E. 20 (1905).

of form" constitute the basis for its claim, the other reasons being an asserted interference with its business for commercial purposes (respondent's answering brief, p. 39).²⁰

It seems to us that if this matter should be construed to involve a restraint on alienation, an important threshold issue would be whether the trading stamps themselves constitute personal property." The fact that respondent contends that it is not selling stamps but offering a promotional service suggests that it is not relying on property rights. Complaint counsel appear to recognize this difficulty and, accordingly, at page 26 of their reply brief, assert in part as follows:

Although we have taken no exception to the Examiner's finding that respondent is in the business of selling a "promotional service" and that it does not sell stamps as such * * *, we also think it clear that trading stamps are a separate and identifiable component of the "service," which can be freely traded and exchanged * * *.

If respondent's trading stamps are considered in such terms, would respondent, by placing a restriction upon their transfer or disposition, be in violation of the "ancient rule against restraints on alienation"?

²⁰ Also in its answering brief respondent states: "Respondent is *not engaged* in the business of selling goods, or putting goods in the stream of commerce *while purporting to reserve title*. The trading stamps themselves have no value. Respondent merely uses its stamps as tokens or symbols which represent its obligation to deliver merchandise to customers in accordance with its license agreements and its redemption catalogs." (Emphasis supplied.) (Respondent's answering brief, p. 28.)

²¹ See *Sperry and Hutchinson v. Hertzberg*, *supra* note 8 and other cases cited therein.

United States v. Arnold, Schwinn & Co., supra, at 380. Under that decision, once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or the persons to whom it may be transferred is a per se violation of Section 1 of the Sherman Act.

If such a test were to be applied in this case, the showing would not be sufficient to justify respondent's actions. Although respondent gives notice in the collector's book that it reserves title in the stamps and the books to itself and also has a provision in its contract with each licensee for reservation of title in the stamps (no such notification, however, being made on the stamps themselves), other indicia of ownership—especially, acceptance of risk—are absent or not shown in this record. For instance, vice president Rossi knew of no tax paid on stamps issued by the company in the hands of the licensees and he knew of no action to stop swapping by customers of licensees. Additionally, respondent does not replace stamps stolen from its licensees. It is clear the evidence is not sufficient to demonstrate that the respondent has exercised dominion over the stamps.

However, we do not believe it appropriate to decide the broad competitive questions presented in this record on the narrow and technical basis of a restraint on alienation. The circumstances here are much different from that where products are transferred to a dealer for resale. They are complicated by the nature of the trading stamp scheme. It is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition. Thus, we intend to look at the substance of the allegedly illegal practice rather than to decide the case by application of a technical

formula. Cf. *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964). We now turn to the evidence which the record may contain as to the competitive effects of the restrictions which respondent has placed on the transfer of its stamps and of respondent's suppression of trading stamp exchanges.

The examiner's findings as to the effects of respondent's suppressive activities are set forth on page 53 of the initial decision. As heretofore noted, these include respondent's individual actions, although he did not find that respondent had violated the law acting alone. Furthermore, while the examiner appeared to limit his findings on injury from these practices to the suppression of trading stamp exchanges, some of the same effects which he noted would also have resulted from the suppression of other trading stamp redemption activity. The effects found by the examiner were that the suppression substantially reduced the trading volumes of the trading stamp exchanges and that it disadvantaged the stamp collecting consumers who did not have, after respondent's actions, the same freedom of choice in the disposition of trading stamps.

There is no question that respondent's suppression policy restrained trade and had severe anticompetitive effects in the marketplace. As above pointed out, in addition to the injunctive actions taken by respondent between 1957 and 1965, it sent out a total of 315 warning letters concerning the redemption of its stamps by others. Appendix B attached to the initial decision and specifically incorporated into the Commission's findings herein lists a number of concerns against which respondent took action for redeeming or exchanging S&H trading stamps. In practically all cases the firms (many of which were retailers) were forced to abandon their redemption or exchange practices.

Respondent suppressed or restricted the activities of trading stamp exchanges which were practically exclusively engaged in the business of redeeming or exchanging trading stamps. Some of these have been listed above. Such trading stamp exchanges suffered a serious loss of business when they were compelled to discontinue dealing in respondent's stamps. For instance, William Rance testified that his best estimate of the business lost after respondent obtained an injunction against him was a gross income decline of between 40 and 60 percent and that was because of the popularity of the S&H stamp in the market in which William Rance did business. Mrs. DeBolt testified that 60 percent of the transactions in her exchange involved S&H stamps. Certain of these concerns were forced out of business. For example, the record indicates that the Trading Stamp Exchange in Los Angeles had to give up exchanging stamps upon threat of an injunction by respondent. Warren Wooley, who advertised a stamp exchange, upon threat of a lawsuit "became frightened and quit the operation" (CX 325).

Respondent's dominance in the trading stamp field and the popularity of its S&H stamp greatly enhanced the effects of respondent's suppression practices. William Rance testified that in Oklahoma City there were approximately 15 different kinds of stamps but that the three most important were Top Value, Gunn Brothers, and S&H because these resulted in the most volume turnover. He stated that the effect of respondent's injunction against him involved not only S&H stamps but the swapping of other varieties of stamps as well, because if customers had S&H green stamps and could not exchange them as part of the whole deal he would lose the business. In short, it appears that respondent has monopoly power over

the small trading stamp exchanges in the sense that they may be unable to effectively operate without S&H stamps and when respondent forces them to discontinue dealing in S&H stamps their businesses are severely curtailed, if not destroyed. Respondent's actions, therefore, against the trading stamp exchanges tended to eliminate the operations of a whole class of businessmen who provided, or had been providing, a useful and valuable function.

Respondent, in curtailing or eliminating the activity of retailers in collecting or exchanging S&H stamps (as distinguished from trading stamp exchanges), restrained trade at the retail level. It is important to note that so far as such exchange activity by retailers is shown on this record the stamps obtained were not reissued. The retailers involved were vying for the patronage of consumers who collected S&H and other trading stamps. As an example, the record contains testimony of Victor H. Savin, president of the V. Savin Company, Inc., doing business as Tifon Jewelers in New Haven, Connecticut. Tifon Jewelers sells products such as diamonds, watches, rings, appliances, luggage and many similar household and jewelry items. Mr. Savin considered himself in competition with other firms selling similar merchandise as well as the trading stamp redemption centers. In 1958 Tifon Jewelers offered to take in trading stamp books toward the purchase of the products it sold. Tifon was forced to stop this practice by threat of an injunction from respondent. In this instance, as well as other instances shown by the record, respondent's actions restrained the retailers from a practical and effective response to stamp competition in their markets. Mr. Savin testified that the promotion, before he was forced to discontinue it, was a good promotion and that it was effective.

The record shows a number of instances of other retailers who offered to redeem or exchange trading stamps and were stopped by respondent, e.g., Jake's Department Store, Thibodaux, Louisiana, and Good Deal Supermarkets, Irvington, New Jersey, referred to above. From the nature of the offers and the circumstances in most cases, it appears that the purpose of the retailer was not to be in the exchange business but to attract customers. In other words, trading stamp exchange activity was used as a spur to, or a method of meeting this form of, competition. Where the retailer is faced with stamp competition, his most effective response might be an offer to exchange or redeem the stamps. Respondent, by its suppression practices, prevents any such competitive reaction, and thereby it has restrained trade. We believe this is an unfair method of competition and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act and so hold.

Finally, we come to a consideration of respondent's actions, in collaboration with its competitors, against trading stamp exchanges and other redemption activities. The examiner, on page 60 of the initial decision, found that there were a substantial number of instances (which he lists on pages 44-47 and which findings have been specifically incorporated into the Commission's findings) of combined activity between respondent and one or more other trading stamp companies to prevent exchanges from trading in their stamps. He found that these acts constituted at least ad hoc restrictive agreements among competitors and therefore violations of Section 5 of the Federal Trade Commission Act.

Respondent's policy of suppressing the redemption of S&H trading stamps by others than itself coincides with the policies of major trading stamp companies,

including Top Value, King Korn, Gold Bond, Merchants Green, and Stop & Save. Respondent and certain of the other trading stamp companies have exchanged information on the question of dealing with exchange or redemption activity. There are a number of instances in the record, revealed by correspondence between respondent's attorneys and those of other trading stamp companies, in which joint efforts to combat this practice are suggested. These include an instance in Joplin, Missouri, in which a supermarket was exchanging TV stamps for S&H stamps; an instance involving Warren Wooley, who advertised in a Memphis, Tennessee newspaper that he would exchange stamps; an instance with a Raymondville, Texas merchant who offered to purchase, trade or redeem any stamp for \$2.00 per book; a situation involving the Mayfair Market, a supermarket in Redbank, New Jersey, an account of Philadelphia Yellow Stamp Company, which was exchanging S&H for Yellow stamps; and others.

In a particular instance, to show more detail, respondent's counsel, on March 8, 1957, wrote to Baries of Saxonburg, Pennsylvania, demanding the discontinuance of the redeeming of S&H stamps and stated in part:

We would also like to advise you at this time that the Prudential Premium Company, the trading stamp company of which you are an authorized licensee, has assured us that they are against having their licensees engage in practices of this type. In fact, their attorneys have cooperated with us in putting an end to it in various parts of the country. (CX 365.)

In each of the instances mentioned there were contacts between respondent's counsel and representatives of the other trading stamp companies involved concerning the action to be taken against the offending redemption organization. In some instances joint litigation was considered but generally no legal action was taken. Typically, the party engaged in the trading stamp activity was contacted by respondent or another trading stamp company involved with a threat of litigation, and the party ordinarily discontinued the practice without question or controversy.

Respondent's individual acts and its acts with others taken to suppress trading stamp exchanges and other stamp redemption activity are all part of a clearly defined restrictive policy pursued by the respondent. In the circumstances surrounding this particular practice it is difficult to wholly separate the individual acts from the collective acts for the purpose of making an analysis of the consequences under the antitrust laws.

Our approach to the matter is to look first at the activity involved (which in this instance is respondent's suppression not only of trading stamp exchanges but all other free and open redemption of trading stamps) and to determine whether such is anticompetitive. In light of the above discussion we believe it is clear that respondent's suppressive actions, whether taken alone or jointly with others, has adversely affected competition.

Respondent argues that cooperation looking toward joint legal action is not illegal. But respondent has gone beyond merely joining with another concern for the purpose of contemplating or bringing a common lawsuit. Here various leading trading stamp companies have a common policy against the redemption

and exchanging of trading stamps except by the company which issues them. In the common interest, respondent and one or more of the trading stamp companies did contact each other from time to time concerning possible action against exchange and redemption activities and, for the most part, suppression of the activity was achieved without litigation. In respondent's case it was its policy to suppress such activity and it did so both by acting individually and in concert with others."

In the circumstances we believe it is clearly shown, and we hold, that respondent, both alone and in combination with other trading stamp companies, engaged in limiting competition in the use of trading stamps and that its policies and actions in this regard are unfair and in violation of Section 5 of the Federal Trade Commission Act.

Finally, we come to the form of the order to be issued. We believe the order proposed by complaint counsel is appropriate, with several modifications. First, since the reissuance of trading stamps is in no way involved in this proceeding, the order to be issued with this case should make an appropriate exception for actions involving such a practice engaged in by respondent individually.

Secondly, respondent challenges the order proposed by complaint counsel to the extent it would apply to the setting of a minimum rate for the dispensing of stamps by retailers as well as the maximum. Respondent asserts that no allegation in the complaint and no evidence in the record supports such an order. It

Respondent, in its brief, contends that even warning letters sent out and lawsuits commenced in good faith may violate the antitrust laws if undertaken for the purpose of achieving or maintaining a monopoly, a boycott or some other unlawful restraint of trade.

claims that the necessity for a minimum requirement is self-evident; that if respondent could not set the minimum rate it would have no assurance of revenue of significance for the franchise granted; and that consumer confidence in the S&H system would be destroyed.

We construe respondent's argument to extend only to the provisions applying to it individually since it did not raise this issue as to the form of the examiner's order covering jointly engaged in or conspiratorial acts. The record contains evidence, moreover, that respondent acted in cooperation with others to fix not only the maximum but the minimum rate for stamps as well, e.g., the Denver, Colorado situation.

So far as respondent bases its argument on its individual acts the situation is this: No evidence was offered as to any retailer dispensing stamps on the basis of less than ten for one, and there is no particular evidence as to the competitive effect such a restraint might have. In the circumstances, we are of the view that the order should not proscribe respondent's individual acts or policies on fixing a minimum ratio of the dispensing of its stamps and our order to be issued herewith will so provide.

In accordance with the above, the appeal of complaint counsel and that of respondent are granted to the extent indicated and otherwise denied. It is directed that the initial decision be vacated to the extent that it is inconsistent with the views herein expressed and that the Commission's own findings of fact, conclusions and order be substituted therefor. An appropriate order will be entered.

Commissioner Elman concurred and has filed a concurring statement.

Commissioner Jones dissented and has filed a dissenting statement.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

United States of America Before Federal Trade
Commission

Commissioners Paul Rand Dixon, Chairman, Philip Elman, Everette MacIntyre, Mary Gardiner Jones, James M. Nicholson.

Docket No. 8671

In the Matter of

THE SPERRY AND HUTCHINSON COMPANY, A
CORPORATION

Concurring Statement of Commissioner Elman

I dissented from the issuance of the complaint in this matter because I believed that the many difficult questions raised by the pervasive use of trading stamps, as well as the restrictive arrangements by which they are distributed, deserve broader study and analysis than a case-by-case approach permits. The market structure and distribution methods revealed in this record confirm my earlier view that litigation is not the most satisfactory way to deal with the problems raised by trading stamps and similar forms of nonprice competition.

The Commission, without making any finding as to "the desirability of the use of [trading] stamp competition in place of price competition", determines that such stamp competition is "worth preserving against

limitations and restraints."¹ Justified as that determination may be on the present record, it does not come to grips with such major questions as the impact of trading stamps on merchandising costs and prices, and their effect in "tying" customers to particular retailers who dispense stamps, nor does it cast any light on the general competitive problems associated with their use. For example, a staff report to the National Commission on Food Marketing² suggests that franchise arrangements and price discrimination in the sale of trading stamps have a major effect on competition in food retailing. Smaller retailers are either unable to obtain franchises from the large stamp companies, whose stamps are generally more desirable because of their wide consumer acceptance, or they pay more for stamps than do their larger competitors, a cost difference that may be an important competitive factor in the retail grocery industry. Case-by-case adjudication is not the best vehicle for consideration and resolution of these broad problems.

Similarly, while there are a few small firms, the trading stamp industry is highly concentrated, as the Commission finds,³ with the six largest firms accounting for well over 80% of both the dollar volume received and stamps issued. Quite apart from the evidence of horizontal collusion present in this record, there are strong indications that many of the practices here found to be illegal, for example respondent's one-for-ten policy, its restrictions on multiple stamping, and its vigilant efforts to restrain the operation of stamp exchanges, reflect a general industrywide

¹ Opinion pp. 24-25.

² *Organization and Competition in Food Retailing*, Technical Study No. 7, National Commission on Food Marketing, June 1966, pp. 471-473.

³ Finding of fact 22.

pattern. This is not to imply any prejudgment that these practices exist or that they are substantial, but the Commission would have done better to explore all these questions more fully in a context broader than a single adjudicative proceeding against one company. An industry wide study could focus not only on the issue of the extent to which respondent's restrictive practices reflect a broader industrywide pattern, and the competitive impact of those practices, but also on the larger questions of the desirability of trading stamps as a form of competition, their effect on food marketing and on other areas of retail trade, and their economic implications for consumers and the competitive process.

Had the Commission undertaken such a study it would have been able to analyze this form of competition and assess its merits and disadvantages, its economic effects and ramifications, in a meaningful context. On the basis of its general findings the Commission would have been in a position to take such action as the public interest might require, perhaps simply proceeding against individual law violators to eliminate particular restrictive practices, or developing broad guidelines for the industry, or, if necessary, preparing a report to Congress indicating gaps in existing law and suggesting areas appropriate for legislative action.

Although I regret the limited case-by-case approach here taken, the record amply supports the findings that respondent has engaged in a number of unfair

* As is pointed out in the majority opinion, a number of states have passed laws regulating the activities of trading stamp companies, and even now there are bills dealing with this subject pending before Congress. See, e.g., H.R. 8914, 90th Cong., 1st Sess. (1967).

and anticompetitive practices. Accordingly, I concur in the Commission's decision and order.

The suggestion that the interests of competition and the consuming public might somehow be advanced if a provision were added to the order prohibiting respondent from setting a minimum ratio for dispensing its trading stamps seems rather farfetched. The argument, which is based on speculation rather than evidence, is that there are "undoubtedly" many small retailers who could afford to purchase respondent's stamps but do not do so because of the requirement that they be dispensed at a ratio of at least one stamp for every ten cents worth of sales; that these retailers (assuming there are any) might want to "compete" by offering stamps at a ratio less attractive to consumers, e.g., one for every twenty cents worth of sales; and that respondent's one-for-ten policy "forecloses" such retailers from engaging in such "competition". It could be argued with equal plausibility that the mere suggestion by a manufacturer of a retail price for his product "forecloses" some retailers from "competing" by charging the public a higher price. It has not heretofore been considered that this common everyday practice of American manufacturers of consumer products, ranging from toothpaste to television sets, constitutes an unlawful restraint of trade prohibited by the antitrust laws.

by compelling purchasers of its stamps not to dispense more than one trading stamp for each 10 cents worth of goods or services and by agreeing with its competitors to eliminate competition by preventing the dispensing of more than one trading stamp for each 10 cents worth of services.

to the complaint as original respondent from of number of trading stamps to the total stamps purchased * * * (emphasis added). Yet for reasons which are not disclosed in the majority's opinion, the Commission has retreated from the original order provision and omits any prohibition on respondent against fixing this ratio in the future as it has done in the past. Instead the Commission's order sim-

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United States of America Before Federal Trade
Commission

Commissioners Paul Rand Dixon, Chairman, Philip
Elman, Everette MacIntyre, Mary Gardiner Jones,
James M. Nicholson

(Docket No. 8671)

In the Matter of

THE SPERRY AND HUTCHINSON COMPANY,
A CORPORATION

Dissenting Statement of Commissioner Jones

I cannot agree with the Commission majority in this case that respondent be permitted to continue to fix the ratio at which its customers must dispense trading stamps. The majority's decision is wholly inconsistent with their finding that respondent had violated Section 5 of the Federal Trade Commission Act by compelling purchasers of its stamps not to dispense more than one trading stamp for each 10 cents worth of goods or services and by agreeing with its competitors to eliminate competition by preventing the dispensing of more than one trading stamp for each 10 cents worth of goods or services.

The notice order attached to the complaint as originally filed would have prohibited respondent from "fixing *any* specified ratio of number of trading stamps to the total retail price of goods and/or services purchased * * *" (emphasis added). Yet for reasons which are not disclosed in the majority's opinion, the Commission has retreated from the original order provision and omits any prohibition on respondent against fixing this ratio in the future as it has done in the past. Instead the Commission's order sim-

ply prohibits respondent from preventing its customers from offering stamps in any amount in *excess* of this fixed ratio. I cannot find any basis in this record for this major retreat by the majority from the original notice order and accordingly I am compelled to dissent from the decision.

The uncontested evidence in the record shows that respondent sells books of stamps to retailers at \$2.68 per book and entered into contracts with its customers which required them to dispense these stamps at a fixed ratio of one stamp for every 10 cents worth of sales. The evidence also shows that respondent enforced these fixed ratio contract provisions and in their policing activities against violating retailers specifically advised these customers of their obligation to dispense the stamps which they had purchased from respondent at the 1-for 10 ratio required in the contract.

The Commission recognizes that respondent's fixing of a designated ratio restrains the competition of its retailer customers. It admits in its opinion that trading stamps are an important competitive factor, that there is an interrelationship between *price* competition and *stamp* competition, that "trading stamps affect price behavior" and points to the examiner's finding that "a restriction on the giving of stamps may affect the prices of the competitor of the stamp-issuing retailer and thus the price offers in the market." Yet it determines that respondent can continue to fix this ratio provided it does not prevent its customers from dispensing *more* stamps than the designated ratio. The impact of the Commission decision is to permit a little bit of price fixing provided it is the fixing of a minimum price but not a maximum.

I can find no sanction in law or in reason or indeed in the competitive realities of the marketplace for this inexplicable and illogical conclusion.

What the Commission fails to recognize is that respondent's fixing even of a minimum dispensing ratio forecloses many competitors from being able to use trading stamps as a competitive tool. There are undoubtedly many small retailers who could afford to purchase respondent's stamps but cannot do so because of respondent's requirement that they must be dispensed at a specified ratio in relation to sales. The cost to the retailer of respondent's trading stamp is a combination of the amount he pays for the stamps plus the number of stamps which he uses. If he were free to determine for himself the number of stamps which he wishes to offer per dollar of sales, smaller retailers who could not afford to offer 1 stamp for every 10 cents worth of sales, might nevertheless be able to offer a lesser number of stamps. Because of the interest of consumers in collecting stamps, these retailers would be more able to compete for the business of these customers by offering some stamps than if they could not offer stamps at all. Thus respondent's specification of the one-for-ten ratio thus forecloses some competitors from using this competitive device and to this extent restrains the competition of potential users just as much as it restrains the competition of actual users.

The vice in respondent's activities here lies not simply in its requirement that its customers refrain from double or multiple stamping as the majority seems to believe. The vice lies in the fact that respondent fixes *any* ratio at which its customers must dispense stamps which they have purchased from respondent. Respondent's customers are the owners of these stamps as they are the owners of the produce which they purchase from their suppliers. They have complete ownership rights in these stamps just as they would any other premium they might purchase

to give away as a promotion device. Respondent cannot change this fact no matter how much it seeks to by characterizing its sales of stamps as a licensing arrangement.

The Supreme Court just this term had occasion to review the long line of decisions relating to minimum and maximum price fixing in *Albrecht v. The Herald Company*, --- U.S. --- (1968). In a forceful opinion, the Court again reiterated its view on the illegality of all forms of price fixing. As the Court said:

Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices. It is our view, there-

fore, that the combination formed by the respondent in this case to force petitioner to maintain specified prices for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.

Even if this case is viewed as involving some form of marketing restraint which though similar to price fixing should not be judged in terms of the reasonableness of the restraints rather than on the traditional concepts of *per se* illegality, the restraints which respondent has imposed are clearly unreasonable. Respondent sought to argue that it must be permitted to fix the actual minimum ratio in order to remain in business. This argument is wholly unpersuasive. Respondent does not need to fix the ratio at which its retailer-customers shall dispense S&H stamps in order to assure itself of revenue any more than any seller engaged in the sale of its products to wholesalers or retailers needs to fix the amount of the product which his reseller will resell in order to assure itself of revenue. As the hearing examiner found—and respondent does not challenge—respondent fixes a specific price to the retailer for its stamps. This is its assurance of revenue. Of course respondent's revenue will increase as its customers purchase more of its product but this does not give it a right to force its customers into purchasing any stated amount. The fact that respondent's customers traditionally dispense these stamps on the basis of the dollar volume of their customers' purchases is no reason why respondent should be permitted to designate the ratio at which its customers decide to dispense the stamp.

I find equally unimpressive respondent's other argument that it must fix the ratio at which its stamps will be dispensed in order to maintain consumer confidence in its product. Consumers are of course concerned to know the number of stamps which a given merchant is dispensing per dollar of sales. But a consumer does not lose confidence in the product because merchants vary the amount it sells any more than they lose confidence in a product which can be purchased at different prices in different retail establishments.

It is obvious from this record that competition among stores offering these stamps as well as with stores not able to offer stamps on respondent's terms may be severely restrained if respondent is permitted to fix the ratio at which its customers must dispense S&H stamps to the consumer.

The Commission's decision in this case grants to every trading stamp company which fixes the ratio at which its customers must dispense its stamps a license to violate the antitrust laws. I cannot be a party to such an amendment of the antitrust laws carved out for any single industry.

JUNE 26, 1968.

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OCTOBER TERM, 1970

No. ~~1270~~

70-70

FEDERAL TRADE COMMISSION,

Petitioner,

v.

THE SPERRY AND HUTCHINSON COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1278

FEDERAL TRADE COMMISSION,

Petitioner,

v.

THE SPERRY AND HUTCHINSON COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Question Presented

Whether the authority of the Federal Trade Commission to challenge "unfair methods of competition" and "unfair or deceptive acts and practices" under Section 5(a)(1) of the Federal Trade Commission Act has been curtailed by the court of appeals' opinion.¹

Statement

Respondent The Sperry and Hutchinson Company (hereinafter sometimes called "S&H") submits the following supplementary statement of facts which are deemed important.

¹ Petitioner has set forth two "questions presented," while respondent states only one (a modification of petitioner's first question). The reason respondent omits petitioner's second question is that that question is not in fact present in this case (see pp. 9-10 *infra*).

As appears from the summary of the facts set forth in the opinion of the court of appeals (App. 2a-5a) and in the petition for certiorari (pp. 4-6), S&H is engaged in the business of providing its trading stamp service to retail merchants who are licensed by S&H to issue its trading stamps to their customers. In the words of the court below: "The purpose of S. & H.'s service is to enable its licensees to increase and to maintain their sales by attracting customers and inducing those customers to return, again and again, until they have collected enough stamps to secure the redemption articles of their choice" (App. 4a).

Throughout S&H's history non-licensed retailers and stamp brokers have attempted to acquire S&H stamps from others in order to issue them to their own customers (J.A. III, 333; App. 104a). Notwithstanding petitioner's theories that such commercial trafficking in S&H trading stamps does not injure S&H, the plain fact is that if S&H could no longer obtain judicial relief from such trafficking in its stamps, the stamps would no longer serve their essential purpose of attracting customers to the retail store which is licensed to issue them. If the competing merchant across the street were free to offer to redeem the stamps in his own merchandise or to apply the stamps as down payment on goods purchased,² the incentive for the S&H licensed merchant to use S&H stamps would disappear. Not only would the stamps then lose their promotional purpose of encouraging continued patronage; they would become an instrument to introduce the customer to the store of the competitor across the street who would be redeeming them (J.A. III, 210, 250-51).

As the hearing examiner found:

² For examples of such practices, see App. 104a-105a.

"Moreover, as a matter of common knowledge, it must be recognized that since the promotional service sold by respondent is one designed to bring customers into a licensee's store by the issuance of a popular S&H stamp, this design cannot be realized in the long run if a customer can get the popular S&H stamp at an exchange by surrendering a different stamp secured at some other store. . . ." (J.A. I, 61).

Continuous unrestricted redemptions and other dealings in S&H trading stamps would seriously injure and could ultimately destroy the trading stamp business. A finding to this effect was made by the examiner on the basis of the evidence:

"If stamps can be traded, the attraction of the customer to a licensee's store caused by the issuance of S&H stamps is destroyed. The customer can trade anywhere and exchange other stamps for S&H. Thus the licensee does not get what he pays for" (J.A. I, 76).

The examiner concluded that S&H's "restriction [on transferability] is inherently essential to carrying out the purpose of the promotional scheme" (J.A. I, 61).

The irreparable injury to S&H resulting from unauthorized redemptions and use of its stamps, and the unfair competition which is inherent in such trafficking, has been recognized for more than 60 years by courts throughout the country which have granted equitable relief against the unauthorized use of trading stamps (J.A. II, 588-92).

The Commission held that S&H's policy had "restrained trade and had severe anticompetitive effects in the marketplace" (App. 112a). The Commission said that its task was "to determine whether or not there has been or may

be an impairment of competition" (App. 111a) and concluded that S&H had been "engaged in limiting competition" (App. 118a). That conclusion was based on its findings that S&H's conduct had "tended to eliminate the operations of a whole class of businessmen" (i.e., trading stamp exchange operators) (App. 114a) and that it "restrained trade at the retail level" (*id.*) by preventing retailers in competition with S&H licensees from redeeming or exchanging S&H stamps.

The court of appeals set aside the Commission's order. While agreeing that the injunctions issued by state and federal courts had "no doubt injured the business of the traffickers," the court stated that "the Commission cannot rest its case solely on the determination that injury to a competitor exists" (App. 6a). The court held that to be "unfair" within the meaning of Section 5 of the Federal Trade Commission Act an allegedly anticompetitive practice "must be more than a mere restraint of competition. . . . The Commission should at least determine that the practice violates the policy or spirit of the antitrust law" (App. 8a).

Argument

A writ of certiorari is sought in this case on the sole ground that the opinion below raises important questions of federal law which should be settled by this Court. It is respectfully submitted that the opinion below does not raise any new or significant issue with regard to the interpretation of Section 5.

I.

The Opinion of the Court of Appeals Does Not Curtail the Broad Powers of the Commission Under Section 5.

The first "question presented" submitted by the petitioner is whether Section 5 is "limited to conduct which violates the letter or spirit of the antitrust laws" (Petition, 2).

Obviously, Section 5 is not thus limited with respect to all of its aspects, and the opinion of the court below does not so hold.

It is well established that the Commission has the power under Section 5 to enjoin acts and practices (1) which are *deceptive*, such as misleading advertising, *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); (2) which are *inherently unfair*, such as the selling of merchandise by means of a lottery scheme, *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304 (1934); and (3) which *unduly restrict competition*, *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965).

The question presented for review to the court of appeals was whether S&H's conduct in restraining unauthorized persons from using S&H stamps constituted an undue restriction on competition. Thus, this case falls squarely within the third of the above categories. This was recognized by the court below when it prefaced its discussion of the legal problem before it with this statement:

"The traffickers in S. & H. stamps have been enjoined forty-three times by state and federal courts. This

court action has no doubt injured the businesses of the traffickers. However, the Commission cannot rest its case solely on the determination that *injury to a competitor exists*" (App. 6a, emphasis supplied).

In this context, the court went on to state that the Commission should declare acts "unfair" only if they violate the antitrust laws or "the *spirit* of these Acts" (App. 7a) or "the *policy or spirit* of the antitrust law" (App. 8a). It is obvious that this statement by the court applies exclusively to acts or practices which are challenged by the Commission *on the ground that they unduly restrict competition*. Neither the Commission's findings nor opinion ever stated that S&H's institution of legal proceedings to halt unauthorized trafficking in trading stamps was deceptive or that it was inherently unfair within the meaning of *Keppel, supra*. Accordingly, conduct challenged by the Commission on the ground that it may be (1) deceptive or (2) inherently unfair is in no way affected by the court's decision.³

As the court below pointed out (App. 7a-8a), this Court has held that practices which are challenged by the Commission on the ground that they unduly restrict competition may be held to violate Section 5 even though they do not violate the antitrust laws *if* they have "the characteristics of recognized antitrust violations," *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 369-70 (1965), or if they constitute incipient antitrust violations or "conflict with the basic policies of the Sherman and Clay-

³ Thus, the court's decision would have no bearing upon the Commission's efforts to protect consumers against conduct alleged to be inherently unfair, such as its proposed rule dealing with negative option plans employed by book and record clubs, referred to at page 16 of the petition.

ton Acts," *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

Applying this test in its broadest form, the court below stated that with regard to conduct alleged to be unduly restrictive of competition the "Commission should at least determine that the practice violates the policy or spirit of the antitrust law" (App. 8a). This statement of the court does not narrow the authority of the Commission. It applies the rules developed by this Court and gives the Commission extremely broad scope, for many anticompetitive practices may be said to violate "the policy or spirit of the antitrust law" even though they do not violate the laws as such (App. 8a). There is no basis whatsoever for petitioner's statement (Petition, 11) that the court's opinion reflects a return to the doctrine of *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920). In fact, far from resurrecting *Gratz*, the court expressly followed *Brown Shoe* (App. 7a-8a) which buried *Gratz*.

The court below held that the facts in the record in this case did not support a finding by the Commission that S&H's actions in seeking judicial relief against traffickers in trading stamps violated the policy or spirit of the antitrust laws. The dissenting judge disagreed, indicating that: "There should be little doubt that with the benefit of the spirit of the Sherman Act, the Commission acted within the scope of Section 5 of the FTC Act" (App. 16a).

The question whether the majority of the court below or the dissenting judge was correct in the application of the law to the facts of this case is of no significance in considering whether a writ of certiorari should be granted, for this question is not designated in the petition as a "ques-

tion presented," nor is it fairly comprised therein, in accordance with Supreme Court Rule 23(1)(c). Accordingly, that is a question which is not to be considered by this Court.

The petition reflects disagreement with the analysis of the record by the court below, which decided the case solely on the basis of whether S&H's conduct constituted an undue restriction on competition. Even if the question whether the court properly analyzed the record had been presented in the petition, it would not bring to this Court an important matter of federal law to determine. And the Commission's own treatment of the case provided ample reason for the court below to limit its decision to an analysis of whether S&H's conduct violated the spirit or policy of the antitrust laws. The Commission repeatedly emphasized that it was deciding the matter on the basis of whether S&H had restrained competition.⁴

⁴ In its opinion, the Commission began its discussion of the law with a quotation of Section 5(a)(1) and immediately thereafter sought definition of its powers in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), *Atlantic Refining, supra*, *Brown Shoe, supra*, and *Luria Brothers Co. v. Federal Trade Commission*, 389 F.2d 847 (3d Cir. 1968), all decisions dealing with the effects of unfair acts upon *competition* (App. 77a-79a). The Commission then said that it would "look at all the facts of record to determine if *competitive activity has been or may be impaired*" (App. 79a). In its subsequent analysis, it looked at the "possible harm to *competition*" caused by S&H's practices and their "*competitive effects*" (App. 109a). It considered the "broad *competitive* questions presented" (App. 111a); said that "[i]t is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of *competition*" (App. 111a); and it then turned "to the evidence which the record may contain as to the *competitive effects* of the restrictions . . ." (App. 112a). The Commission stated that S&H's practices "restrained trade and had severe *anti-competitive effects* in the marketplace" (App. 112a) for the reason that "trading stamp exchanges suffered a serious loss of business

II.

The Second "Question Presented" by Petitioner Is Not in Fact Present in This Case, for the Court Below Did Not Hold or Suggest That Court Decisions Upholding S&H's Conduct Foreclose the Commission From Finding That Such Conduct Violates Section 5.

Contrary to petitioner's inference in its second "question presented" (Petition, 2), the decision of the court of appeals neither holds nor suggests that "decisions under state law in private litigation . . . foreclose the Commission from declaring such restraints to be unfair within the meaning of Section 5."

In exploring its second "question presented", petitioner states:

"The court below relied heavily on decisions under state law in which S&H obtained injunctions against stamp exchanges on theories of 'misappropriation of goodwill' or 'tortious interference with business relations.' See *e.g.*, *Rance v. Sperry & Hutchinson Co.*, 410 P. 2d 859 (Okla.), certiorari denied, 382 U. S. 945 [1965]. By its emphasis on these decisions, the court appears to have rejected, or at least substantially limited, the

(App. 113a) and the restraints upon unauthorized redeeming retailers "*restrained trade at the retail level*" (App. 114a). It said "[o]ur approach to the matter is to look first at the activity . . . and to determine whether such is *anticompetitive*" . . . and it found S&H's action "*has adversely affected competition*" (App. 117a). Thereupon, it pronounced its holding that S&H "*engaged in limiting competition* in the use of trading stamps and that its policies and actions *in this regard* are unfair and in violation of Section 5 of the Federal Trade Commission Act" (App. 118a). Thus, it was in the context of the effect of acts and practices upon competition that the proceeding was appealed to the court below.

Commission's exercise of its power when its action conflicts with state policy" (Petition, 13-14).

While the court below, in that part of its opinion which recited the facts of the case, noted that injunctions had issued against unauthorized users of trading stamps and that four states have statutes prohibiting trafficking in stamps (App. 5a-6a), nothing in the opinion supports the claim that the "court below relied heavily on decisions under state law in which S&H obtained injunctions." In fact, the court's opinion below, unlike petitioner's application for certiorari, did not cite a single one among the many reported decisions in which an injunction issued against traffickers. In these circumstances, there is no justification for petitioner's assertion that: "By its emphasis on these decisions, the court appears to have rejected, or at least substantially limited, the Commission's exercise of its power when its action conflicts with state policy."

As petitioner states (Petition, 14): "State policy may, of course, be a factor to be considered along with other aspects of public interest in reaching a decision under Section 5", citing *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission*, 263 F.2d 502 (4th Cir., 1959).⁵ However, it is beyond dispute, given the Supremacy Clause of the Constitution, that court decisions interpreting state law do not and cannot "foreclose the Commission from declaring such restraints to be unfair within the meaning of Section 5."

For the foregoing reasons, it follows that the second "question presented" designated by petitioner is not in fact present in this case, and hence should be disregarded.

⁵ Indeed, the court in *Asheville Tobacco* actually said "should be considered," not "may" be considered (at 512).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 1278

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE SPERRY AND HUTCHINSON COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (App. III, 387-403) is reported at 432 F.2d 146. The opinion of the Federal Trade Commission (App. I, 137-190) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals (App. III, 404) was entered on September 29, 1970. On December 22, 1970, Mr. Justice Black extended the

time for filing a petition for a writ of certiorari to and including January 27, 1971. The petition was filed on the latter date, and granted on March 29, 1971 (App. III, 405). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 5 of the Federal Trade Commission Act, which directs the Commission to prevent "unfair methods of competition * * * and unfair or deceptive acts or practices," is limited to conduct which violates the letter or spirit of the antitrust laws.

2. Whether decisions under state law in private litigation holding that commercial restraints which the Commission seeks to prevent are lawful, foreclose the Commission from declaring such restraints to be unfair within the meaning of Section 5.

STATUTE INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 717, 719, as amended, 15 U.S.C. 45(a), provides in part:

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

On November 15, 1965, the Federal Trade Commission issued a three-count complaint charging the Sperry and Hutchinson Company ("S&H"), the nation's largest trading stamp company, with violating Section 5 of the Federal Trade Commission Act. Count III, which is at issue here,¹ challenged S&H's practice of suppressing individually and in combination with other trading stamp companies, the free and open redemption and exchange of its S&H green stamps. Count III alleged specifically that S&H had suppressed independent trading stamp exchanges, "unfairly to the detriment of the persons engaged in such business * * * and unfairly to the detriment of the members of the consuming public who have thereby been deprived of the opportunity of exchanging one type of trading stamp for another in order to facilitate their redemption;" had unfairly denied the public the opportunity to redeem stamps through persons other than S&H; and had unjustly interfered "with the right of the consuming public to enjoy the full use of their personal property" (App. I, 8-9).

The Commission's hearing examiner sustained only the portions of the complaint charging a combination of S&H and others (App. I, 23-84). The Commission, however, sustained the entire complaint and

¹ Counts I and II dealt with S&H's individual and collective action to prohibit retailers who dispense S&H stamps from giving more than one stamp for each ten cent purchase. The Commission held against S&H on these counts, and S&H did not challenge the decision on them in the court of appeals.

issued a cease and desist order (App. I, 126-130) against the unfair practices, including the restriction of free and open redemption and exchange. The court of appeals ruled that the Commission had exceeded its authority under Section 5 with respect to Count III and set aside the part of its order dealing with redemption and exchange.

A. S&H and the Trading Stamp Industry

Trading stamps—small pieces of gummed paper about the size of postage stamps—have been employed in retail selling since the turn of the century. They are traditionally purchased from trading stamp companies by retailers, who issue them to consumers in proportion to their purchases. When the stamps have been collected in sufficient numbers and pasted in books, consumers may redeem them, ordinarily for merchandise, at stamp company redemption centers.

Within the past 20 years, trading stamps have achieved a significant role in retailing. In 1964, the various trading stamp companies issued approximately 400 billion stamps to more than 200,000 retail establishments. The cost of the stamps to retailers was \$800 million; the volume of retail sales in connection with which stamps were issued was \$40 billion (App. I, 105).

A primary vehicle for trading stamps is the retail food business.² From 1950 to 1962, the share of re-

² Nearly 62 percent of S&H's revenue comes from supermarkets and other food stores; service stations account for 21.2 percent (App. I, 107-108).

tail grocery store sales with which trading stamps were issued rose from one percent to 47 percent (App. I, 105). All major supermarket chains dispense stamps in at least some of their stores (App. I, 110-111).³ About 50 percent of the stamps issued to consumers are issued in connection with grocery sales (App. I, 105).

The trading stamp industry is highly concentrated. While there are approximately 400 trading stamp companies, most are very small. In 1964 six companies accounted for 83 percent of the stamps issued and 88 percent of the dollar volume received. S&H, with 38 percent of the stamps issued, and 40 percent of the dollar volume received, is by far the largest trading stamp company. Its share of the market is almost three times that of its closest rival, and more than ten times that of the sixth largest company in the industry (App. I, 110, 114).

Thirty-five million American households save trading stamps (App. I, 151), frequently accumulating more than one brand. More than 60 percent of all consumers save S&H green stamps (App. I, 113).

B. Redemption and Exchange

When a consumer has at least one full book of S&H green stamps,⁴ she may redeem stamps for mer-

³ In several geographical areas the number of food stores dispensing stamps is well in excess of 70 percent of the total stores in the market. In the Dallas-Fort Worth market, for example, 97 percent of the food markets dispense stamps; in Salt Lake City, 86 percent; and in Miami, 79 percent. *Ibid.*

⁴ A full book contains 1,200 stamps. Its average cost to the retailer is \$2.68 and its average retail value is \$3.00. No

chandise at redemption centers which S&H maintains throughout the country (App. I, 106, 108).⁵ S&H offers approximately 2,000 articles (App. I, 108), which constitute, in the words of the company's vice-president for corporate research, "a limited line of staple gift type items" (App. III, 349).

Not all stamps are redeemed. Of the stamps issued by S&H between 1914 and 1964, 156 billion (or 130 million filled books of 1200 stamps), or about 14 percent, remained outstanding at the end of 1964 (App. I, 109, 141). Since the retail value of each book is \$3.00, the value to the consumer of these unredeemed stamps is approximately \$390 million.

S&H, like other trading stamp companies, attempts to limit the redemption and exchange of its green stamps. A "notice" on the inside cover of the stamp saver book advises the consumer that S&H retains title to the stamps "at all times" and that "[t]he only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption" (App. II, 230).⁶ S&H's contract with its licen-

item may be secured for less than one book (App. I, 106, 108-109).

⁵ Sixteen states require that the stamp saver be given an option to redeem in cash, and two require redemption in cash only. Kansas prohibits the issuance of stamps in connection with sales of merchandise and Washington imposes a heavy tax on merchants who use stamps redeemable in merchandise (App. I, 108).

⁶ The notice also states that S&H will, upon application, give the stamp saver permission to give the stamps "to any other bona fide collector" (App. II, 230). "Not a great many"

sees also provides that title to the stamps shall remain in S&H, although the company does not pay taxes on issued stamps in the hands of its licensees or replace stamps stolen from them (App. I, 110).

Consumers have not strictly adhered to the restrictions on exchange and redemption. In 1960, for example, 20 percent of all stamp savers traded with other collectors, usually without authorization (App. I, 110). They have, moreover, patronized trading stamp exchanges.⁷ These small independent businessmen buy and sell trading stamps and, for a small fee, exchange them.⁸ They usually stock a wide variety of different brands, both local and non-local (e.g., App. III, 16—50 varieties). The exchanges also maintain stamp company catalogs, so that the consumer can more readily ascertain the cost and availability of merchandise from the various companies (App. II, 465; App. III, 119-121, 156). Consumers also have redeemed their stamps at certain

consumers actually ask for this permission, however (App. III, 316). There is no reference to S&H's policy with respect to transferability printed on the stamps themselves. The Commission found that most consumer witnesses were "doubtful or uninformed" regarding that policy (App. I, 109-110).

⁷ Private "swapping" frequently is not possible because the range of available brands is inadequate (App. III, 117-118)..

⁸ The typical fee for exchange of one book of stamps for another ranges from 30 to 50 cents (App. I, 170). Simple purchase at an exchange of a book of S&H stamps, worth \$3.00 in retail merchandise, costs between \$2.40 (App. III, 166) and \$2.75 (App. II, 467). The exchanges do not sell stamps to retailers for reissuance to the public (App. I, 169).

retail establishments which have offered a variety of goods and services for them.*

Consumers evidently desire to exchange, purchase, or sell stamps for a variety of reasons. Many consumers shop at several different stores, which issue different brands of stamps, rather than shopping only at stores which issue the same brand. Eighty percent of S&H stamp savers collect at least one other brand, while nearly ten percent save three or more brands (App. II, 525). Frequently, consumers wish to consolidate different brands they have collected into one brand. The consumer who is able to consolidate, or to purchase a particular brand, has greater latitude regarding the merchandise she obtains, as well as the time and place she obtains it.

It may take a consumer "forever to get a book" of stamps she infrequently receives (App. III, 91). By consolidation she can more quickly obtain value for these stamps. Similarly, if an individual wishes to obtain a major item, she will have enough books sooner if she can consolidate all her stamps into one brand (App. III, 101).¹⁰ Merchandise, or a particu-

* See, e.g., App. II, 237 (department store in Louisiana), 251 (food for the poor in New Jersey), 277-278 (used cars in Texas), 279 (jewelry in Connecticut), 355 (gift shop in Ohio), 358 (pianos in Colorado), 360-361 (vacuum cleaners in Colorado); App. III, 202-206 (department store in Pennsylvania), 214-257 (department store in Maryland).

¹⁰ Charities which seek to pool stamps donated to them in order to obtain a major item also are assisted by consolidation (App. III, 35, 121, 179-183). While S&H does permit and encourage pooling by charities (App. I, 110), it opposes consolidation by them of various stamps into a brand (App. III, 124).

lar brand, which is desired may be available at only one redemption center (App. II, 470-471; App. III, 56-57, 101-102, 153-154). Or, an item may cost fewer books at one center than another (App. II, 465; App. III, 56, 101).

The ability to exchange stamps thus enables the consumer to shop comparatively. A certain redemption center may be much more convenient for the consumer and she may prefer to consolidate her stamps into the brand of that company rather than journeying to different centers located in various areas (App. III, 15, 51, 101, 206-208, 238-239). *

The consumer may also need a particular item at a particular time: "the birthday present, the bike or the wedding gift that they have to have for tomorrow" (App. III, 102). At gift-giving times, such as Christmas, the need to consolidate or purchase additional stamps is particularly great (App. III, 153). As one witness testified: "Trading stamp companies offer a variety of premiums that make ideal Christmas gifts, and it is a practice among quite a number of people to save their stamps until Christmas time * * * and they run into problems of proper numbers of stamps, at the proper redemption centers * * *" (App. III, 24).

By exchange, sale, or purchase, the consumer may also make use of odd numbers of stamps from which she would otherwise obtain no value. Many stamp companies operate only in certain geographical areas (App. III, 15-16, 158-159). Consumers who move to a new area may find that stamps they formerly saved are not issued there. They may therefore wish

to exchange their old stamps for a brand which is issued in their new area (App. II, 469; App. III, 14), or to purchase additional stamps of the brand they previously saved in order to be able to redeem them (App. III, 10).

The ability to redeem stamps in cash or merchandise not offered at redemption centers also enhances the usefulness of stamps to consumers. A consumer occasionally desires to convert his trading stamps into cash. This occurs most frequently when the consumer is moving to an area where trading stamps are not issued. For example, military men being sent overseas may wish to get some use out of their stamps before they leave (App. III, 9-10, 23; see also App. III, 103).

Ordinary retailers who offer to redeem trading stamps will frequently afford the consumer a wider or different range of merchandise from which to select. Department stores typically carry merchandise in a range of colors, styles, brands and prices "which is substantially greater than the choice available from the S&H catalog" (App. II, 527). Other stores may offer certain necessities—such as inexpensive underwear and clothes for children and infants (App. III, 209, 233, 245) or work shoes (App. III, 218), which poor people need more than merchandise with a minimum value of \$3.00 which is available from redemption centers, see generally App. III, 202-257.

S&H has moved vigorously, and quite successfully, to suppress the activities of stamp exchanges, and to stop retailers from redeeming S&H stamps for mer-

chandise (App. II, 237-446, 536-567). A letter threatening immediate court action most often has been sufficient to cause termination of the activity (*e.g.*, App. II, 317-319, 389-390). Respondent has also obtained injunctions under state law against exchange and redemption by these businesses (App. II, 588-592). Between 1957 and 1965, S&H sent approximately 140 warning letters to stamp exchanges and 175 warning letters to merchants redeeming S&H stamps; it also filed as many as sixteen complaints seeking injunctions (App. I, 121).

C. The Commission Decision

The Commission ruled that respondent's suppression of free and open redemption and exchange of trading stamps was an unfair practice in violation of Section 5 of the Federal Trade Commission Act. It stated that its responsibility under the Act "is simply to determine, in light of the public interest, whether or not the practices as alleged are unfair within the meaning of Section 5 * * *." (App. I, 149.) The Commission noted that "'unfair' methods, acts and practices * * * are not limited to violations of the Sherman Act, as respondent's argument appears to suggest. * * * [T]he Commission * * * may find a violation of the Act without a showing of such anticompetitive effects as would be required under the antitrust laws." (App. I, 150, 151.)

The Commission then examined "all the facts of record" to determine whether S&H's actions were "unfair" (App. I, 151). It found (as had its hearing examiner to whose findings on the issue it re-

ferred) that respondent's suppression practices "disadvantaged the stamp collecting consumers who did not have, after respondent's actions, the same freedom of choice in the disposition of trading stamps" (App. I, 176); that those practices, enhanced in effectiveness by respondent's dominance in the trading stamp market, "tended to eliminate the operations of a whole class of businessmen [the stamp exchanges] who provided * * * a useful and valuable function" (App. I, 177); and that they eliminated a "competitive reaction" to firms issuing stamps by merchants who offer to redeem stamps for their own merchandise in order to compete with the closed trading stamp system (App. I, 178).

The Commission rejected respondent's asserted business justifications for its restrictive practices (see *infra*, pp. 31-32), pointing out that it had offered no "hard facts," but only "broad generalities" from its own officers and employees in support of them. The Commission further held that even if S&H had put forth legitimate business reasons, the adverse effects of its practices would have outweighed them (App. I, 174, 180).

The Commission accordingly concluded that S&H's suppression practices "are to the prejudice and injury of the public, have unreasonably restrained, injured and impaired competition, and thereby constitute unfair methods of competition in commerce and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act" (App. I, 126). It ordered respondent to cease and desist, independently or with other trading stamp companies, from

suppressing the "free and open redemption or exchange of trading stamps" by exchanges or retailers, or otherwise interfering with "the freedom of any retailer to whom the respondent has issued trading stamps or any person to whom such retailer dispenses or transfers such respondent's trading stamps, to alienate such stamps" (App. I, 128).¹¹

D. The Court of Appeals Decision

The court of appeals reversed (Wisdom, J., dissenting), holding that the Commission's order "exceeds its statutory authority" (App. III, 394). "To be the type of practice that the Commission has the power to declare 'unfair,'" the court ruled, an act must be either "(1) a per se violation of antitrust policy; (2) a violation of the letter of * * * [the antitrust laws]; or (3) a violation of the spirit of these [laws] * * * as recognized by the Supreme Court of the United States" (App. III, 392). For there to be a violation of the "spirit" of the antitrust laws, the court continued, the allegedly illegal practice must be one which, when "full blown," would violate the antitrust laws or have the characteristics of an antitrust violation (App. III, 393). It reasoned that "Congress could not have intended to vest the Commission with such broad discretion as to allow it to label a restraint 'unfair' without applying some

¹¹ The Commission's order was expressly made inapplicable to any practice relating to the "reissuance" of S&H stamps. Thus, S&H was not foreclosed from preventing a nonlicensed retailer from acquiring S&H stamps and redispensing them with the sale of goods or services (App. I, 129, 180).

judicial guidelines in making their findings" (App. III, 393).

Applying these limits, the court concluded that the Commission had been "unable to point to any anti-trust law which S&H has violated either in letter or spirit" (App. III, 394). Mere injury to the business of the exchanges was not enough, especially since the activities of the exchanges have "time and time again * * * been declared unlawful" by courts under state law (*ibid.*).

Judge Wisdom, in his dissent, argued that Section 5 empowers the Commission to act "whenever it uncovers [trade] practices which are undesirable or inimical to the public interest" (App. III, 398). Reviewing the legislative history of the Act, as well as the decisions of this Court, he asserted that "the Commission did exactly what Congress intended it to do—that is, decide whether S&H's practices were unfair on the facts before it in the light of the public interest" (App. III, 401-402). Judge Wisdom concluded that the record supported the Commission's finding that "S&H's suppressive activities have a detrimental effect on consumers and on competition" and that [t]hese effects outweigh the damage to * * * [S&H] that will be caused by the Commission's order" (402). Judge Wisdom also disagreed with the majority on the application of the Section 5 standard which it employed. He suggested that respondent's actions in restraining retailers from redeeming green stamps for their merchandise and eliminating entirely the stamp exchanges violated the letter or spirit of the antitrust laws (App. III, 400-402).

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that the authority of the Commission under Section 5 of the Federal Trade Commission Act is limited to violations of the letter or spirit of the antitrust laws. The Act gives the Commission comprehensive power to prevent trade practices which are deceptive or unfair to consumers, regardless of whether they also are anticompetitive.

Congress—in passing the Act in 1914 and amending it in 1938 to establish firmly the Commission's power to act specifically on behalf of the consumer—wisely made no attempt to define the term “unfair,” or to enumerate the trade practices which were within the ambit of Section 5. It realized that no catalog of unfair practices could ever be sufficient to protect American businessmen or consumers from all possible harmful or oppressive trade practices in an evolving economy. It therefore empowered the Commission to apply Section 5 in a dynamic and flexible manner to keep pace with contemporary conditions.

The Commission, exercising its broad responsibility, has taken action against a gamut of practices which were unfair to consumers or competitors. It properly exercised its authority in this case to order respondent to cease its practice of restricting the free and open redemption and exchange of trading stamps because that practice is unfair to both consumers who receive stamps and businessmen who offer to exchange or redeem them.

There is ample support in the record for the Commission's finding that respondent's restrictive re-

demption policy is oppressive to consumers because it deprives them of the opportunity to obtain the maximum value for stamps they have received. Retailers dispense stamps to consumers in proportion to their purchases. Consumers must collect stamps if they are to obtain full benefit from their expenditures. Free and open redemption and exchange permits, as the record shows, consumers to maximize the benefits from their stamps and, hence, from these expenditures.

The record similarly supports the conclusion that respondent's restrictive practices are unfair to trading stamp exchanges and to retailers who offer to redeem stamps for their merchandise. Both perform an important service to consumers. But, the evidence shows, the exchanges literally cannot survive economically unless they can buy, sell, and trade green stamps, the most popular brand. And retail merchants are deprived of a means of competing with the closed trading stamp system by these practices.

The Commission also correctly concluded that the business justification offered by respondent for its restrictive practices was insubstantial. There was no concrete evidence that suppression of free and open redemption and exchange is necessary to achieve legitimate business objectives. Available evidence on the likely effect of elimination of respondent's restrictive policy, in fact, suggested that its business would not suffer as a result.

The Commission was, finally, not bound by decisions under state law granting injunctions in favor

of respondent against unauthorized trading stamp activity. It is firmly established that federal regulatory decisions may override state policies. In this case, moreover, there is no uniform state policy approving restrictions on the use of trading stamps. To the contrary, as many as twenty states have enacted regulatory measures, such as requiring stamp companies to permit redemption in cash, which prevent them from applying certain restrictive policies. Moreover, many of the decisions upon which respondent relies dealt primarily with reissuance of stamps by merchants who were not licensed to dispense green stamps and obtained them from third parties. The Commission's order, however, specifically does not preclude respondent's efforts to prevent this practice.

The Commission was, in sum, justified—after examining the impact of respondent's practices upon the consuming public, stamp exchange operators, and retailers who offer to redeem green stamps, as well as the prospective effect of elimination of those practices upon respondent's business—in concluding that the restrictive practices were unfair under Section 5.

ARGUMENT

I. The Commission's Comprehensive Authority Under Section 5 To Prevent Unfair Acts Or Practices Is Not Confined To Those Which Violate The Letter or Spirit Of The Antitrust Laws.

The court of appeals adopted an erroneously restrictive view of the Commission's power under Section 5 of the Federal Trade Commission Act. Its

authority is not limited, as the court ruled, to prohibiting conduct which violates the "letter or spirit" of the antitrust laws. The Commission has, rather, a comprehensive mandate under Section 5 to prevent unfair methods of competition and unfair or deceptive acts or practices. 15 U.S.C. 45(a). It is firmly established, by the legislative history of the Act and the Wheeler-Lea Amendment to the Act, as well as by decisions of this Court, that this mandate extends to trade practices which are unfair to consumers, irrespective of whether they also are anticompetitive.

1. Congress, when it created the Federal Trade Commission in 1914, invested that administrative body with a continuing responsibility to prevent "unfair methods of competition." Congress intentionally refrained from attempting to define that phrase or to enumerate the practices which were within its scope, preferring to permit the Commission to develop its meaning, in the light of its experience, to keep pace with changing competitive conditions. As the Senate Committee Report explained (S. Rep. No. 597, 63d Cong., 2d Sess., p. 13):

The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illi-

nois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.

See also H.R. Rep. No. 1142, 63d Cong., 2d Sess., pp. 18-19 (conference report).

This Court, in *Federal Trade Commission v. Gratz*, 253 U.S. 421, interpreted the Commission's power to prevent unfair methods of competition quite narrowly, ruling, in effect, that it extended only to practices which were actual antitrust violations or which were then commonly understood by the business community to be unfair. 253 U.S. at 427-428. Mr. Justice Brandeis dissented, contending essentially that Congress had not intended to limit the Commission's authority by such a static and restricted conception of unfair methods of competition. The Court subsequently "rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis * * * that the Commission has broad powers to declare trade practices unfair." *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 320-321. See, e.g., *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392; *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 694.

The decision in *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, was significant in the developing recognition of the breadth of the Commission's power. The Commission found respondent's use of "break and take" packages in the sale of penny candy to be an unfair method of competi-

tion. Certain packages of candy entitled the purchaser to a prize or money. The candy itself was generally smaller or inferior to that available at the same price in "straight" packages. The Commission found that use of break and take packages in selling candy was an unfair method of competition because it was "a lottery or gambling device" by which consumers, especially children, were enticed to buy such candy rather than straight goods. 291 U.S. at 308. It concluded that "the sale or distribution of candy by lot or chance is against public policy" (*ibid.*) and that competitors who had refused to employ break and take packages had unfairly been placed at a competitive disadvantage.

The respondent, relying upon *Gratz*, argued that the Commission had exceeded its power because "the practice * * * does not fall within any of the classes which this Court has held subject to the Commission's prohibition," such as those involving fraud or deception. 291 U.S. at 309. The Court, however, explicitly rejected this position (291 U.S. at 310):

Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftmanship to have restricted the oper-

ation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.

2. The Wheeler-Lea Amendment to the Federal Trade Commission Act in 1938, 52 Stat. 111, expanded the authority of the Commission even further. By that amendment, Congress added to the Commission's power to prevent unfair methods of competition the further power to prevent "unfair or deceptive acts or practices." The legislative history emphasizes the comprehensive nature of the Commission's mandate to protect the public from unfair trade practices.

The Court had placed one significant limitation on the Commission's authority under Section 5 prior to that amendment. In *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, it ruled that the Commission lacked jurisdiction to prevent unfair practices, even though prevention of them was in the public interest, unless they also had an adverse impact upon competition. It stressed that the purpose of the Federal Trade Commission Act, as well as the Sherman and Clayton Acts, was "to protect the public from abuses arising in the course of competitive * * * trade," 283 U.S. at 647. The Court found it "impossible * * * to conclude that Congress intended to vest the Commission with the general power to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect upon

the trade of competitors," 283 U.S. at 651. The Court pointedly suggested that "[i]f broader powers be desirable they must be conferred by Congress," 283 U.S. at 649. Congress accepted this invitation by adding "unfair or deceptive acts or practices" to the Commission's jurisdiction so that it could fully protect "consumers as well as * * * competitors." *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 384.

The House Report on the bill noted that "[t]he experience of the Commission has demonstrated the need of broader powers," since the Act had been "construed as if its purpose were to protect competitors only and to afford no protection to the consumer without showing injury to a competitor." H.R. Rep. No. 1613, 75th Cong., 1st Sess., pp. 2-3. It concluded that "the proposed amendment * * * makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer * * *." *Id.* at 3.

The Senate Report similarly objected that *Raladam* precluded the Commission's acting against unfair trade practices that do not injure a competitor "no matter how badly the public may be in need of protection from said-deceptive and unfair acts." S. Rep. No. 221, 75th Cong., 1st Sess., p. 3. "Under the proposed amendment," the Report continued, "the Commission would have jurisdiction to stop the exploitation or deception of the public, even though the competitors of the respondent are themselves entitled to no protection because of their engaging in similar practices." *Ibid.*

Comments in the Congressional debate, which centered more around proposed amendments dealing with misleading advertising than the addition to Section 5, conveyed the same message. Congressman Lea's explanation was typical, "[T]he principle of the act is carried further to protect the consumer as well as the competitor. * * * [W]e go further and afford a protection to the consumers of the country that they have not heretofore enjoyed." 83 Cong. Rec. 391-393; see also 83 Cong. Rec. 395 (Rep. Wolverton); 83 Cong. Rec. 397 (Rep. Reece); 83 Cong. Rec. 401 (Rep. Halleck); 83 Cong. Rec. 3290 (Sen. Wheeler).

3. It is true, of course, that the "broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts." *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 321. But this fact in no way lessens the power of the Commission—which it has consistently exercised and which the courts have fully recognized—to take action to protect consumers from unfair or deceptive practices. The *Keppel* case firmly established that power although it was necessary, prior to the Wheeler-Lea Amendment, also to show harm to competitors. As *Keppel* and early cases dealing with deceptive practices (e.g. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67; *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483) illustrate, a particular practice which is harmful to consumers may also have an adverse impact upon competition. The precise point of the

Wheeler-Lea Amendment, however, was to remove the need for proof of this additional element.

The Commission has, as Congress anticipated when it refrained from attempting to enumerate the conduct covered by the Act, sought to prevent a wide range of unfair or deceptive acts or practices. Since *Keppel*, this Court has not specifically considered a case, like the present one, in which the claim of unfairness is not based essentially upon alleged deceptiveness. But its approach in deceptive practice cases upholding the Commission's "influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations," *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385, applies equally to acts or practices whose unfairness stems essentially from other factors. See also, *Federal Trade Commission v. Mary Carter Paint Co.*, 382 U.S. 46. The language of the statute is disjunctive—unfair or deceptive.

The courts of appeals have recognized the Commission's broad authority under Section 5 to prohibit unfair practices that are not deceptive. The condemned acts or practices whose unfairness stemmed from factors other than or in addition to deceptiveness include: sale of goods by lottery or other games of chance (*Goldberg v. Federal Trade Commission*, 283 F. 2d 299 (C.A. 7); *Lichtenstein v. Federal Trade Commission*, 194 F. 2d 607 (C.A. 9)); delivery of goods which were not ordered or attempting to force the customer to accept substitutes (*National Trade Publications Service, Inc. v. Federal Trade Commission*, 300 F. 2d 790 (C.A. 8); *Norman Co.*,

40 F.T.C. 296); coercing payment, by threats to sue and other harassing tactics, for delivered goods which were not ordered or which were different in quantity or quality from those ordered (*Federal Trade Commission v. Consumers Home Equipment Co.*, 164 F. 2d 972 (C.A. 6); *Dorfman v. Federal Trade Commission*, 144 F. 2d 737, 739-740 (C.A. 8)); refusing to reassemble furnace immediately and without waiver of liability to company, whose employee had represented himself as a government inspector and had dismantled furnace without owner's permission (*Federal Trade Commission v. Holland Furnace Co.*, 295 F. 2d 302 (C.A. 7)); commercial bribery and "payola" (*Federal Trade Commission v. Grand Rapids Varnish Co.*, 41 F. 2d 996 (C.A. 6); *Bernard Lowe Enterprises, Inc.*, 59 F.T.C. 1485); and other forms of interference with the business of a competitor (*Independent Directory Corp. v. Federal Trade Commission*, 188 F. 2d 468 (C.A. 2); *Hastings Mfg. Co. v. Federal Trade Commission*, 153 F. 2d 253 (C.A. 6)). See, also, *Zlotnick the Furrier, Inc.*, 48 F.T.C. 1068, and *Interstate Home Equipment Co.*, 40 F.T.C. 260 (refusing to return deposits or make refunds).

The Commission has recently increased its efforts, particularly under its rule-making authority (15 U.S.C. 46(g)), to prevent practices which are unfair to the consumer in various ways, although they are not necessarily deceptive. Cf. Cox, Fellmeth & Schulz, *The Consumer and The Federal Trade Commission*; *Report of ABA Commission To Study the Federal Trade Commission*. It has, for example, is-

sued rules against the mailing of unsolicited credit cards, 16 C.F.R. 421,¹² and the operation of games of chance in the food retailing and gasoline industries, 16 C.F.R. 419. It has proposed significant rules regarding the customer billing practices of credit card issuers and other retail establishments, 16 C.F.R. 430 (Proposed), 35 Fed. Reg. 15842 (Oct. 8, 1970), establishing a period during which purchases of goods sold door-to-door may rescind their purchase, 16 C.F.R. 429 (Proposed), 35 Fed. Reg. 15164 (Sept. 29, 1970), 36 Fed. Reg. 1211 (Jan. 26, 1971), and permitting purchasers by installment contract to raise defenses which would be available against the seller in actions by third parties to whom their notes have been assigned, 16 C.F.R. 433 (Proposed), 36 Fed. Reg. 1211 (Jan. 26, 1971). See *All-State Industries of North Carolina, Inc. v. Federal Trade Commission*, 423 F. 2d 423 (C.A. 4), certiorari denied, 400 U.S. 828 (affirming Commission order, issued in complaint proceedings, requiring disclosure by seller that promissory note may be assigned to third party against whom defenses may not be available). See also, *Philip Morris, Inc.*, 3 CCH Trade Reg. Rep. ¶ 19548, p. 21,620 (Dkt. No. 8838, complaint issued, March 12, 1971) (alleged unfair practice, because of health hazard, of distributing sample razor blades in newspaper advertisements).

¹² The rule was rescinded after the enactment of P.L. 91-508, 84 Stat. 1126, which amended the Truth in Lending Act, 15 U.S.C. (Supp. V) 1601, *et seq.*, to prohibit issuance of credit cards except upon request. 36 Fed. Reg. 45 (Jan. 5, 1971).

The Commission's recent efforts to protect consumers against unfair practices emphasize the importance of reaffirming its traditional authority over such matters. The narrow view of the agency's powers taken by the court of appeals is inconsistent with the language and history of the statute and the consistent pattern of judicial decisions, and would seriously impede the Commission in the performance of this important aspect of its work.

II. The Record Supports The Commission's Finding That S&H's Policy Of Restricting Redemption And Exchange Of Its Trading Stamps Is An Unfair Act Or Practice In Violation Of Section 5.

Judicial review of Commission action under its comprehensive Section 5 power "is limited to determining whether * * * [its] decision 'has "warrant in the record" and a reasonable basis in law.'" *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367. As we have argued, the Commission's power extends to practices which are unfair, regardless of whether they are also anticompetitive. The Commission, accordingly, had a reasonable basis in law for examining the consequences of those practices to the consuming public, as well as to stamp exchange operators and retailers who offer to redeem stamps for their merchandise, in determining whether they were unfair within Section 5. There is, moreover, "warrant in the record" for its conclusions that the practices are unfair because they deprive consumers of full benefit from the trading stamps they receive and unreasonably prevent stamp exchange oper-

ators and retailers who redeem stamps from engaging in legitimate business conduct.

A. *Consumers.* The Commission's basic conclusion with respect to the harm to consumers is that respondent's restrictive policy deprived them of "the * * * freedom of choice in the disposition of trading stamps" they otherwise would have (App. I, 176). The record fully details the many important reasons why consumers desire to exchange or redeem stamps they have received by means other than those which S&H has authorized (see pp. 8-10, *supra*). By foreclosing those alternatives, S&H simply prevents consumers from obtaining full value from the stamps they receive.

Because of the widespread use of trading stamps, especially by food retailers, many consumers inevitably receive them. The cost of their groceries ordinarily is higher because stamps are issued by retailers. The Commission found that the use of stamps "affect[s] price behavior" and that their use, along with other forms of nonprice competition, has increased historically as price competition has decreased (App. I, 112-113). Regardless of whether the cost of the various means of nonprice competition are, for accounting purposes, allocated to cost of goods sold or to overhead, they are expenses which must be passed on to consumers if the retailer is to make the same profit.

The consumer, if he is to obtain full benefit from his expenditures, must use the services he is offered. He must, in other words, collect stamps and redeem them. Yet many stamps are not redeemed—14 per

cent of all those issued between 1914 and 1964, the equivalent of 130 million books (App. I, 109, 141). The economic consequence of this, from the consumer standpoint, was well summarized by Dr. Stewart Lee, a professor of economics and business administration: "The lack of redemption means that the consumers are not getting full value for the expenditures of their dollars in the marketplace, because she is paying for something, if she gets stamps, and if they are not redeemed, then she is not getting full value" (App. III, 282). See also Comments, *Trading Stamps*, 37 N.Y.U. L. Rev. 1090, 1094-1095. Even those who do redeem their stamps often could have obtained merchandise which they preferred to that available from respondent's redemption centers, or derived other benefits from free and open redemption and exchange.

It is true that retailers provide other services to their customers, like free parking, which the customer must use in the prescribed manner, if at all. Trading stamps bear similarities to these services. But they are also significantly different. For a market has developed in part, no doubt, because of the "price-like * * * nature" of stamps (App. I, 113), through which the customer can make fuller use of them and, as the Commission held, there is no justification for arbitrarily suppressing this market to the consumers' detriment. See point III, *infra*, pp. 31-38.

B. *Trading Stamp Exchanges*. S&H's policy of suppressing trading stamp exchanges "tended to eliminate the operations of a whole class of businessmen who provided * * * a useful and valuable function" (App. I, 177). As the country's largest trading

stamp company, respondent's stamps are collected by 60 percent of American households (App. III, 264), and are the brand most in demand at trading stamp exchanges (App. III, 17). When those stamps may not be traded, exchanges generally suffer a 40 to 60 percent drop in business (App. I, 176-177). S&H thus has, as the Commission concluded (App. I, 177) and as Judge Wisdom noted in dissent, "virtual monopoly power over the existence of the small trading stamp exchanges which were unable to operate effectively without S&H stamps." (App. III, 401, n. 10).

The court of appeals evidently recognized the effect of S&H's practices on stamp exchanges, but insisted that "the Commission cannot rest its case solely on the determination that injury to a competitor exists" (App. III, 391). The Commission's case was not, however, based on that factor alone, for, as it found, there was also injury to consumers whose free choice in redemption and exchange was inhibited. Cf. *United States v. General Motors Corp.*, 384 U.S. 127, 140, 144. Indeed, it is the consumer, as a practical matter, who is ultimately harmed by traditional antitrust violations. Even in assessing the reasonableness of respondent's conduct toward trading stamp exchanges, moreover, the court below erred in rejecting the Commission's conclusion,—which, as we argue below, was supported by the record—that its business justifications were insubstantial.

C. *Retail Merchants.* Retail merchants who offer merchandise for trading stamps similarly perform a valuable service to the consuming public. By offering to redeem stamps, they also meet competition from

the closed trading stamp system. Some retailers evidently seek to attract customers away from competitors, who issue stamps by offering to redeem them (App. I, 178). Others, who sell merchandise similar to that offered by the stamp company redemption centers, offer their merchandise in exchange for trading stamps in order to compete with those centers (App. I, 177). The Commission concluded that S&H restrains trade by "prevent[ing] any such competitive reaction" (App. I, 178). The court below, as it did with respect to trading stamp exchanges, erroneously ignored the value to consumers of retailer redemption and inaccurately and impermissibly weighed the anticompetitive impact of Respondent's suppression policy against the asserted justifications for it in rejecting the Commission's findings.

III. Neither Respondent's Business Justification For Its Practices Nor Decisions Sustaining Those Practices Under State Law Invalidates The Commission's Conclusion That The Practices Are Unfair.

Respondent has offered two related justifications for its practice of suppressing free and open redemption and exchange of its trading stamps—that it is necessary to the success of its business and that the activities of trading stamp exchanges have repeatedly been prohibited under state law. The Commission properly rejected both justifications and the court of appeals erred in its assessment of them.

A. Business Justification. Respondent's primary concern is the effect it fears free and open redemption and exchange will have upon the willingness of

retailers to purchase green stamps and issue them to their customers. Its argument is as follows (App. I, 172; III, 310-311): The greater the likelihood that consumers will patronize stores because they issue green stamps, the more attractive stamps become to the retailer. To increase consumer patronage of retailers who issue green stamps, respondent attempts to restrict the means by which they may be obtained and redeemed. It limits the number of licensees in a given geographic area, and suppresses trading stamp exchanges. The consumer may thus obtain green stamps in a limited number of outlets. Respondent requires the consumer to collect a full book before she may obtain merchandise and requires her to redeem stamps at its centers. Thus, once the consumer begins to receive stamps she must return to retailers who issue them in order to collect enough stamps to redeem. When she does redeem them, at an S&H redemption center, the quality of the merchandise obtained and the attractiveness of the center will prompt her to resume the cycle of saving green stamps.

The purpose of S&H's restrictive system, then, is to control the consumer's collection and redemption of stamps in order to make participation in that system more attractive to retailers.

As the Commission pointed out, however, there were no "hard facts" to support the assertion that respondent's restrictive policies were necessary for legitimate business reasons (App. I, 172). Respondent produced no licensee who testified that he lost business because of a stamp exchange, or because another retailer of-

ferred merchandise for stamps.¹³ None of the twelve major supermarket chains which account for approximately one-third of S&H's revenue (App. I, 107-108), indicated that it had been injured by the exchange. No S&H employee testified about licensee complaints. To the contrary, S&H executives were unable to specify any instances of "complaints from a licensee in respect to unauthorized redemption or a trading stamp exchange" that were brought to their attention (App. II, 442-443, App. III, 317-318).

The Commission noted that the paucity of evidence on the effect of free and open redemption and exchange was largely due to respondent's success in "regularly" suppressing "trading stamp exchanges and other redemption activities" (App. I, 172). But the evidence that was presented suggested that respondent's business would not be harmed by elimination of its restrictive policies. The Commission noted that S&H's business apparently had increased in the one area, Texas and Oklahoma, "where trading stamp exchanges did do business with some regularity before their operations were curtailed" (App. I, 172-

¹³ One S&H food retailer licensee, testifying about a competitor who offered to exchange S&H stamps for his own stamps, was unable to say "that we lost a single customer" because of the promotion (App. III, 375). Another S&H food retailer licensee, who testified about the detrimental effect trading stamp exchanges would have, admitted that he had never had any experience with such exchanges, did not know where any trading stamp exchange was located, and could not recall anyone, other than counsel for S&H, with whom he had ever discussed these exchanges (App. III, 324-326).

173). The Commission also stressed that S&H permits private swapping on request, and encourages charitable pooling of stamps—activities which, like operation of stamp exchanges, do not result in customer visits to the S&H redemption center or in “remembrance value” from durable goods they have obtained by use of stamps they have received (App. I, 173). Indeed, as it found, 20 per cent of stamp savers swapped informally apparently without “damaging * * * respondent’s business” (App. I, 173). Moreover, respondent stated in a prospectus covering a stock offering that state laws requiring it to give the collector the option of redeeming stamps for cash have not “materially affect[ed] its business” (App. II, 576-577).

The Commission also correctly concluded, “upon a more general basis that respondent’s business would not be seriously affected” (App. I, 173). Green stamps are the most popular brand, but neither their popularity nor the policy of restricting the outlets from which they may be obtained has caused consumers generally to pattern their shopping in order to obtain them. A survey conducted for S&H reveals that factors other than the availability of stamps are more significant in influencing shoppers’ choice of retailers (App. II, 513-525). The large majority of stamp savers collect more than the one brand (App. II, 525). Approximately one-third of the people surveyed save whatever stamps they happen to get where they shop; about an equal number like receiving and redeeming stamps, but would not make special efforts to obtain them. Only about 16 percent would go out of their way to get the stamps they save (App. II, 517).

When asked why they shop at a particular food store, consumers gave low priority to the availability of stamps. More than half of them were primarily influenced by the meat department; 43 percent were concerned with the variety of items, or the fruit and vegetable department, and more than 30 percent with the prices charged. Twenty-four percent listed, as essential, that the store give the brand of stamps they save (*id.*, 518); 19 percent listed this factor as important, but not essential (*id.*, 519). Similarly, the availability of stamps played a comparatively minor role in influencing consumer choice of a pharmacy (*id.*, 520) or gasoline service station (*id.*, 521-522), two other major outlets for S&H stamps (App. I, 107).

The conclusions of this study are confirmed by the consumer testimony presented in this case. Witnesses generally accumulated more than one brand of stamps by shopping at several different stores, and their choice of stores was based on factors other than stamps. See App. II, 490-492; App. III, 47-49, 61-63, 79-80, 88-90, 140-141.

Other aspects of S&H's operation, such as the quality of its merchandise and its nationwide operations, thus probably are more responsible for the popularity of green stamps than respondent's policy of limiting the means by which they can be obtained. There is no reason to believe that these elements of its business will be impaired by preventing respondent from suppressing free and open redemption and exchange of its stamps or that their popularity with consumers will diminish as a result. So long as saving green

stamps is attractive to consumers because they are useful, consumers will have an incentive to obtain them for redemption in cash or merchandise. And, if they are most in demand, they will be the most expensive at stamp exchanges and presumably bring the highest value per book upon redemption.¹⁴

There is one obvious advantage to S&H and other stamp companies in restricting free redemption and exchange—the profit in “wasted” stamps or those whose redemption is substantially delayed. S&H operates on the assumption that 95 percent of its stamps will be redeemed. It theoretically passes on the value of the five percent of unredeemed stamps to the purchasing retailers and redeeming consumer (App. III, 295-296). But the record shows, and the Commission found, that a greater percentage of stamps is not redeemed, perhaps as much as 14 percent (App. I, 109, 141), the equivalent of 130 million books. The revenue from sale to retailers of these stamps is profit to S&H.

It is, moreover, advantageous to stamp companies to postpone redemption of stamps that ultimately are

¹⁴ S&H appears consistently to have assumed that, at an exchange, its stamps would trade for other stamps in a one-to-one ratio. But if green stamps are in greatest demand, their greater value will naturally raise their price relative to other stamps. The practice of stamp exchanges confirms this, since they charge more to exchange various local stamps for green stamps than vice-versa (App. III, 7, 33, 114-115, 173-174). Similarly, as the demand for and exchange price of green stamps increases, consumers will presumably have added incentive to seek, and retailers to issue, them (see App. I, 173).

redeemed. The companies are paid for the stamps upon sale to licensees and have the full economic use of revenue from those sales for as long as the stamps are not presented for redemption.

More stamps may thus be redeemed sooner as a result of elimination of restrictions on exchange and redemption. In addition, as Judge Wisdom suggested (App. III, 397), the practical effect of prohibiting respondent's suppression of trading may be to sharpen competition among stamp companies, since the greater choice among redemption sources should prompt stamp companies to supply superior redemption merchandise. The fact that stamp companies' profits may be reduced because a larger percentage of stamps are redeemed cannot justify the restrictions. Cf. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375. Similarly, the prospect of more vigorous competition among stamp companies strongly supports eliminating those restrictions.

The Commission was, in sum, justified in concluding that respondent had no legitimate business justification for its restrictive policies and that its business reasons could not, in any event, outweigh the harm of those policies to consumers, trading stamp operators, and retailers who offer to redeem green stamps. Since, as this Court has emphasized, "[t]he precise impact of a particular practice on the trade is for the Commission, not the courts, to determine," *Federal Trade Commission v. Motion Picture Advertising Co.*, 344 U.S. 392, 396, see *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385,

the Commission's findings should not have been disturbed.

B. *The Impact of State Law.* The court of appeals relied heavily upon decisions under state law in which S&H had obtained injunctions, enforcing its restrictive policies, on theories of "misappropriation of good will," "tortious interference with business relations," or "unfair competition." See, e.g., *Rance v. Sperry & Hutchinson Co.*, 410 P. 2d 859 (Okla. S. Ct.), certiorari denied, 382 U.S. 945; *Sperry & Hutchinson Co. v. Berkeley*, 44 Misc. 2d 331, 253 N.Y.S. 2d 700 (Sup. Ct.), affirmed, 22 App. Div. 2d 762, 254 N.Y.S. 2d 231 (4th Dept.), appeal denied, 15 N.Y. 2d 486, 207 N.E. 2d 622. That reliance was misplaced.

The Commission's authority under Section 5 is not restricted by state or common law of unfair competition. It has long been recognized that federal regulatory authority is not necessarily bound by inconsistent state law. See, e.g., *Campbell v. Hussey*, 368 U.S. 297; *Schwabacher v. United States*, 334 U.S. 182. It is equally well established that paramount considerations of federal policy may override even the clearest state or common law doctrines. See *Lear v. Adkins*, 395 U.S. 653; cf. *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234; *Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225; *United States v. Mitchell*, No. 798, Oct. Term, 1970, decided June 7, 1971. These principles are fully applicable to the Commission, which has been invested by Congress with broadly creative powers to enforce federal policy regarding unfair trade practices. See *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310; *Peerless Products, Inc. v. Federal Trade Commission*,

284 F. 2d 825 (C.A. 7), certiorari denied, 365 U.S. 844.

State policy may, of course, be a factor to be considered along with other aspects of the public interest in applying Section 5. Cf. *Asheville Tobacco Board of Trade v. Federal Trade Commission*, 263 F. 2d 502, 512 (C.A. 4). The Commission was aware, in this case, of the various state law decisions. But it properly recognized that its responsibility under Section 5 was not merely to determine the rights of parties to private litigation, as had courts under state law, but more broadly to assess the public interest, including the interests of consumers who had not been represented in the private suits. Under that standard, it properly concluded that those decisions, and the interests of respondent which they uphold, were not sufficient to overcome the public interest in free and open redemption of trading stamps (App. I, 149).

There is, moreover, no uniform policy among the states approving restrictions on the use of trading stamps. To the contrary, trading stamps have had a "checkered career." *Safeway Stores, Inc. v. Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334, 338. They have long been the subject of restrictive legislation, the constitutionality of which this Court has upheld. See *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342;¹⁵ *Tanner v. Little*, 240 U.S. 369; *Pitney v. Washington*, 240 U.S. 387.

¹⁵ In *Rast* the Court described trading stamps in these words: "[t]hey tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence." 240 U.S. at 365.

Kansas presently prohibits the issuance of trading stamps altogether. Wisconsin and Wyoming allow redemption of stamps in cash only; Washington achieves the same result by imposing a prohibitive tax on merchants who use, and trading stamp companies which supply, stamps redeemable in merchandise. Sixteen other states require the stamp saver to be given an option to redeem stamps in cash. All these states, except Wyoming, require that the stamp saver be allowed to redeem less than a full book for cash (App. I, 108; App. II at 576).⁶ Two states, on the other hand, prohibit the issuance or redemption of stamps without the company's approval. See Cal. Business and Professional Code § 17761 (West Ann., 1964); N. J. Stat. Ann. § 45:23-11 (Supp. 1970).

Nor is it clear that the various judicial decisions support the restrictions on redemption and exchange involved here as strongly as respondent contends. Of the 43 cases brought to enjoin "unauthorized" use of stamps which it lists (App. II, 588-592), 32 are unreported, unappealed trial court decisions, an undetermined number of which represent merely a consent judgment.¹⁶ It is similarly not possible to determine

¹⁶ S&H lists, for example, *Sperry & Hutchinson Co. v. Savth*, where judgment was entered without consideration of the merits by the court, and by stipulation of the defendant. See App. II at 290-293. See also *Sperry & Hutchinson Co. v. Walker*, App. II at 553, where the decree begins by noting that the defendants admitted S&H was entitled to an injunction. Such judgments may well reflect the leverage which S&H possesses because of its ability to bear the costs of litigation. This leverage also enables S&H to terminate unauthorized redemption activities merely by the threat of suit. An

how many of these unreported cases involve reissuance of trading stamps by merchants who purchased them from someone other than S&H.

Most of the reported cases listed by S&H involve reissuance. *E.g.*, *Sperry & Hutchinson Co. v. Fenster*, 219 Fed. 755, 757 (E.D.N.Y.); *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 Fed. 219 (C.A. 7); *Sperry & Hutchinson v. Mechanics' Clothing Co.*, 128 Fed. 800 (C.A. 1). Some even suggest that the result would be different if the party enjoined had been seeking merely to transfer the right to redeem the stamps; rather than attempting to use them to attract customers. See *Sperry & Hutchinson Co. v. Fenster*, *supra*, 219 Fed. at 757; *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, *supra*, 128 Fed. at 803; cf. *Sperry & Hutchinson Co. v. Hertzberg*, 69 N.J. Eq. 264, 60 Atl. 368 (Ct. Ch.) (rejecting even restrictions on right to reissue). Even the

attorney in Memphis, Tennessee, advising S&H counsel of his client's capitulation, stated (App. II, 319):

* * * I stated to him in all frankness I felt we could win the lawsuit since after people get their stamps, they are at liberty to do what they want with them as they are in no way a party to any contract between the stamp company and its franchise holders.

After giving consideration to what the probable cost might be to him and especially since he is a small operator, he has authorized me to state that he was pulling down his sign about exchanging stamps * * *.

Frankly, I wish that I could get ahold [sic] of a client large enough and wealthy enough to try this thing out * * *.

See also App. II, 262. This factor is also recognized by counsel for S&H (App. II, 273).

two cases which clearly deal with trading stamp exchanges, while failing to take the interests of the consuming public into consideration, rely heavily upon the unfair aspects of reissuance. See *Sperry & Hutchinson Co. v. Berkeley*, *supra*; *Rance v. Sperry & Hutchinson Co.*, *supra*.

Restrictions on reissuance are not, however, an issue in this case (App. I, 169). The Commission recognized the distinction between reissuance and redemption and exchange. Under its order, S&H is not foreclosed from preventing a non-licensed retailer from acquiring S&H stamps in order to redispense them to its customers in connection with the sale of goods and services (App. I, 128).

The lack of a uniform state policy approving restrictions on redemption and exchange of trading stamps thus further supports the Commission's conclusion (App. I, 149) that state court decisions prohibiting such redemption and exchange did not bar it, under Section 5 of the Federal Trade Commission Act, from preventing those restrictions because they are unfair and contrary to the public interest.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for entry of a judgment enforcing the Commission's order.

Respectfully submitted.

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OCTOBER TERM, 1971

No. 70-70

FEDERAL TRADE COMMISSION,

v.

Petitioner,

THE SPERRY AND HUTCHINSON COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

—
BRIEF FOR RESPONDENT

Statement

Respondent, The Sperry and Hutchinson Company (hereinafter called "S&H"), submits the following statement of facts to supplement those set forth in petitioner's brief.

S&H has been engaged in the trading stamp business since before the turn of the century (App. I, 104-05). The object of the business is to promote the sales of retail merchants who subscribe to the S&H system. For a fee, measured by the number of stamps taken, S&H licenses the retail merchant to issue its stamps to his customers in connection with their purchases. The customer pastes the stamps in a collector's book, and when the customer has

collected one full book (1,200 stamps) S&H redeems the stamps for merchandise which the customer selects at one of S&H's redemption centers or chooses from S&H's catalogue (App. I, 32, 106). In the words of the court below: "The purpose of S&H's service is to enable its licensees to increase and to maintain their sales by attracting customers and inducing those customers to return, again and again, until they have collected enough stamps to secure the redemption articles of their choice" (App. III, 389).

S&H is not the only trading stamp company in the United States. There are up to 400 in all, of which S&H is the oldest and largest (App. I, 104, 110). It maintains nine regional warehouses, over 850 redemption centers, and spends millions of dollars annually to advertise its system and its redemption merchandise (App. I, 104).

The success of the promotional service which S&H provides and for which its licensees pay depends upon three things: first, the licensee must be unique in his trading area in his ability to offer S&H stamps; second, the customer must fill at least one book with stamps before she becomes entitled to redeem them for merchandise; and third, to redeem her stamps she must visit an S&H redemption center where she will become acquainted with the attractive, high quality merchandise which she will thereafter associate with S&H stamps and the stores where she received them (App. I, 97, 99, 107-108). In other words, the customer's interest must be aroused so that she will return again and again to S&H licensees until, and after, she has filled at least one book with stamps.

Throughout S&H's history non-licensed retailers and stamp brokers have attempted to acquire, exchange and make other commercial use of S&H stamps for their own benefit without S&H's authorization (App. I, 119; App. III, 333). If S&H could not obtain judicial relief from such trafficking in its stamps, the stamps would no longer serve

their essential purpose of attracting customers to the retail stores which are licensed to issue them (App. I, 78). If the competing merchant across the street from an S&H licensee were free to offer to redeem S&H stamps for his own stamps or to accept S&H stamps as full or part payment on goods purchased (see App. I, 119-20), the S&H system would be attracting customers *away* from the S&H licensee who has paid for the service and would become an instrument to introduce the customers to the store of the competitor (App. I, 119; App. III, 210, 250-51). The stamps would then lose their promotional purpose of encouraging continued patronage and the incentive for the S&H-licensed merchant to use S&H stamps would disappear. By using S&H stamps in such a manner, the unlicensed merchant would not only acquire free use of the S&H system for his own benefit but would also frustrate and interfere with S&H's ability to provide licensed merchants with the effective promotional system for which they have contracted.

In a similar fashion, the S&H promotional service would be defeated and its licensed merchants deprived of the advantage for which they have paid if, instead of having to return to them to fill their books, their customers could stop in at a trading stamp exchange and buy, with cash or other stamps, the S&H stamps they need. As the hearing examiner found:

"Moreover, as a matter of common knowledge, it must be recognized that since the promotional service sold by respondent is one designed to bring customers into a licensee's store by the issuance of a popular S&H stamp, this design cannot be realized in the long run if a customer can get the popular S&H stamp at an exchange by surrendering a different stamp secured at some other store" (App. I, 61).

The examiner found that unrestricted redemptions and other dealings in S&H trading stamps would seriously

injure and could ultimately destroy the trading stamp business:

"If stamps can be traded, the attraction of the customer to a licensee's store caused by the issuance of S&H stamps is destroyed. The customer can trade anywhere and exchange other stamps for S&H. Thus the licensee does not get what he pays for." (App. I, 76).

The examiner concluded that S&H's procedure with respect to unauthorized use of its stamps "is inherently essential to carrying out the purpose of the promotional scheme" (App. I, 61).

Whenever unauthorized trafficking in S&H stamps has come to its attention, S&H has followed a uniform procedure of seeking the aid of the courts to stop the practice. The procedure normally involves, first, a letter written by S&H's attorneys to the offender warning him that he is trespassing upon S&H's rights and informing him that S&H intends to seek an injunction if the practice does not stop (App. I, 120). S&H supplies citations to the legal authorities which have unanimously supported its position, with the hope that the offender will voluntarily discontinue the unauthorized use (see App. II, 295, 306). If the trafficker persists, it is the practice of S&H to seek an injunction (App. I, 120-21).

The irreparable injury to S&H resulting from unauthorized redemptions and use of its stamps and the unfair competition which is inherent in such trafficking have been recognized for more than 60 years by courts throughout the country which have granted equitable relief against the unauthorized use of trading stamps (App. II, 588-92).¹

1. From 1904 to 1966, S&H was involved in 43 actions in eight federal districts and 19 states to enjoin the unauthorized use of trading stamps. Each of the 43 cases resulted in an injunction against the defendant (App. II, 588-92).

In addition, such unfair competition has engendered legislation in four states declaring unauthorized use of trading stamps to be unlawful. Cal. Bus. and Profs. Code §17761 (West 1964); Conn. Gen. Stat. Ann. §42-126a(g) (Supp. 1969); Ind. Stat. Ann. §58-705 (Burns 1961); N.J. Rev. Stat. §45:23-11 (Supp. 1971).

The Commission determined that trading stamps are "a viable means of competition at the retail level" and "have become an integral and important part of retailing in America" (App. I, 160). But the Commission, reversing the hearing examiner's decision which had upheld S&H's practices, held that S&H's policy of seeking judicial relief from the unauthorized use of its stamps had "restrained trade and had severe anti-competitive effects in the marketplace" (App. I, 176).

Petitioner's brief states:

"The Commission recognized the distinction between reissuance and exchange [of trading stamps]. Under its order, S&H is not foreclosed from preventing a non-licensed retailer from acquiring S&H stamps in order to redispense them in connection with the sale of goods or services." (Pet. Br. 42).

The Commission thus recognized that S&H's restriction on the unauthorized reissuance of its stamps by competitors of its licensees was justified because of "the unfair aspects of reissuance" (*id.*). However, the Commission rejected the examiner's findings of fact concerning the equally unfair and serious injury to S&H resulting from the diversion of customers of its licensees by their competitors who, under the Commission's order, would be free to redeem S&H stamps.

The court of appeals set aside the Commission's order (App. III, 404). While agreeing that the injunctions issued by state and federal courts had "no doubt injured the businesses of the traffickers," the court stated that "the Commission cannot rest its case solely on the determination that injury to a competitor exists" (App. III, 391). The court held that to be "unfair" within the meaning of Section 5 of the Federal Trade Commission Act an allegedly anticompetitive practice "must be more than a mere restraint of competition. . . . The Commission should at least determine that the practice violates the policy or spirit of the antitrust law" (App. III, 393). The court added: "Considerable importance should be given to the fact that while permitting a small group of businessmen to operate a business the legality of which has been rejected by the Courts the Commission order would itself restrain competition between S&H and other stamp companies" (App. III, 393). Since the Commission was unable to point to any antitrust law which S&H had violated either in letter or spirit, the order was set aside (App. III, 394).

Summary of Argument

The opinion of the court below does not limit Section 5 to conduct which violates the letter or spirit of the antitrust laws. This Court has held that Section 5 applies to conduct falling into three general categories: (1) anticompetitive acts which violate the letter or spirit of the antitrust laws, (2) deceptive practices, and (3) inherently unfair practices. The Commission based its decision on category (1), and the court below reviewed it on the same basis, as it was required to do. Its decision, therefore, does not affect the Commission's jurisdiction over conduct in

other areas. Since the court's analysis under category (1) was correct and has not been challenged by petitioner, that decision should be affirmed (Point I, *infra*).

In this Court, petitioner argues for the first time that S&H's efforts to prevent unauthorized use of its stamps should be condemned because they are unfair to consumers, regardless of whether they are also anticompetitive. The legislative history of Section 5 establishes that Congress intended the term "unfair," when applied to conduct other than anticompetitive or deceptive activity, to mean immoral; unethical or unscrupulous conduct, and the Commission and courts have consistently interpreted the statute in this manner (Point IIA, *infra*).

S&H's action in seeking injunctive relief in the courts from unfair competition did not violate any established concept of unfairness, nor was it morally objectionable. To the contrary, it is unauthorized traffickers in stamps whose activities have long been held unfair (Point IIB, *infra*).

The hearing examiner properly found, on the basis of the uncontroverted testimony of witnesses for both S&H and the Commission, that unauthorized commercial use of S&H stamps would destroy the effectiveness of the S&H system. The Commission erroneously rejected this finding (Point IIB(1), *infra*).

The conditions placed by S&H on the use of its trading stamps are clearly reasonable. Appellate counsel attempt to demonstrate, without benefit of findings by the Commission, that S&H has harmed consumers by limiting their freedom of choice, but counsel have been unable to point to any substantial injury to consumers or others. While the uniformly successful legal actions brought by S&H have obviously been detrimental to trading stamp exchanges, a

court action to obtain an injunction to end an unfair practice which interferes with a legitimate business operation is not an unfair act or practice (Point IIB(2), *infra*).

Over a period of more than 60 years, the courts have issued injunctions against those who engage in unauthorized dealing in trading stamps. It has been held that such traffickers are engaged in unfair competition and interfere with and damage S&H's promotional system. The Commission improperly failed to consider these decisions, despite the fact that they form a body of law important to a proper interpretation of Section 5 in this case (Point IIB(3), *infra*).

In urging this Court to reinstate the Commission's order on the new ground of alleged unfairness to consumers, counsel for petitioner would have this Court uphold the order of the Commission on a basis not relied upon by the Commission in its findings or opinion. Petitioner would thus violate the principle that *post hoc* rationalizations by counsel may not be substituted for agency action and that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency (Point III, *infra*).

ARGUMENT

POINT I

The court below correctly analyzed and decided the case on the basis of the record before it.

The first "Question Presented" by petitioner is whether Section 5 of the Federal Trade Commission Act "is limited to conduct which violates the letter or spirit of the antitrust laws" (Pet. Br. 2). Section 5 has never been thus limited, and the opinion of the court below does not do so.

The Federal Trade Commission has been held by this Court to have jurisdiction under Section 5 in three separate areas: (1) acts and practices restricting competition which violate the letter of the antitrust laws or "bear the characteristics of recognized antitrust violations,"² or which "when full blown, would violate [the Sherman or Clayton] Acts;"³ (2) deceptive practices;⁴ and (3) inherently unfair or unethical practices.⁵

This case, in the decisions of both the Commission and the court of appeals, was consistently regarded as one which should be determined within the framework of the first of the above three categories. It was the Commission, not the court below, which first cited and relied upon cases such as *Atlantic Refining Co. v. FTC* and *FTC v. Brown Shoe Co.*, to emphasize its broad power "with regard to trade practices which conflict with the basic policies of the

2. *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369-70 (1965).

3. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966).

4. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

5. *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304 (1934).

Sherman and Clayton Acts" (App. I, 150), and it was the Commission which stated in its opinion that "[w]e will look to comparable statutes, if any, for guidance" in determining "if competitive activity has been or may be impaired" (App. I, 151).⁶ Nowhere in its opinion did the Commission suggest that S&H's activities are deceptive or inherently unfair, and no case dealing with such categories was mentioned in its opinion.

Thus, it was only in the context of an alleged restraint on competition violative of the letter or spirit of the anti-trust laws that the case was decided by the Commission and presented to the court below for review. It was both natural and proper that the court below should decide the case in the same context. As this Court said in *SEC v. Chenery Corp.*, 318 U. S. 80, 87 (1942):

"The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

In its opinion, the court below noted (App. III, 392-93) that this Court has held that anticompetitive practices may

6. The Commission continuously emphasized in its opinion that it was deciding the matter on the basis of whether S&H had restrained competition. It considered "possible harm to competition" caused by S&H's practices and their "competitive effects" (App. I, 174) and the "broad competitive questions presented" (App. I, 175). It reiterated that "[i]t is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition" (App. I, 175); and it then turned "to the evidence which the record may contain as to the competitive effects of the restrictions . . ." (App. I, 176). The Commission stated that S&H's practices "restrained trade and had severe anticompetitive effects in the marketplace" (*id.*) for the reason that "trading stamp exchanges suffered a serious loss of business" (App. I, 176) and the restraints upon unauthorized redeeming retailers "restrained trade at the retail level" (App. I, 177). It said "[o]ur approach to the matter is to look first at the activity . . . and to determine whether such is anticompetitive . . ." and it found S&H's action "has adversely affected competition" (App. I, 180). Thereupon, it pronounced its holding that S&H "engaged in limiting competition in the use of trading stamps . . ." (*id.*).

violate Section 5 even though they do not violate the antitrust laws if they have "the characteristics of recognized antitrust violations," citing *Atlantic Refining Co. v. FTC* and *FTC v. Brown Shoe Co.* Applying this test in its broadest form, the court below stated that with regard to conduct alleged to be unduly restrictive of competition the "Commission should at least determine that the practice violates the policy or spirit of the antitrust law" (App. III, 393). The court went on to hold that the facts in the record did not support a conclusion by the Commission that S&H's actions in seeking judicial relief against traffickers in trading stamps violated the policy or spirit of the antitrust laws (App. III, 394). Since the court's decision dealt solely with practices alleged to be an unlawful restraint on competition, it in no way affected the Commission's power over conduct challenged on the grounds that it may be deceptive or inherently unfair.

The court of appeals correctly considered and decided the case on the basis of an alleged restraint upon competition. In that context, the court of appeals decision has not been challenged by petitioner, and it should be affirmed.'

7. It might also be noted that if this Court were to conclude that the court of appeals misapprehended the reach of Section 5, then the remedy plainly would be to send the case back to the Fifth Circuit for reconsideration in the light of a correct statement of law. "The reviewing function has been deposited not here, but in the Court of Appeals, as the *Universal Camera* case [340 U.S. 474, 490-91] makes clear." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). See also *FTC v. Borden Co.*, 383 U.S. 637, 647 (1966); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542, 554 (1960).

POINT II

S&H's actions to prevent unauthorized commercial dealing in its trading stamps were not unfair within the meaning of Section 5.

As noted in Point I, the Commission has been held to have jurisdiction under Section 5 over (1) restraints on competition, (2) deceptive practices, and (3) inherently unfair or unethical practices. Although the Commission and the court below decided the case under category (1), petitioner in its brief to this Court has abandoned the contention that S&H's activities violated the letter or spirit of the antitrust laws. Neither of the questions presented raises this issue, nor is there any argument in the brief that such a violation has been shown to exist. Instead, petitioner now argues that S&H's practices are "unfair to consumers, regardless of whether they also are anticompetitive" (Pet. Br. 15, 27) and even though they are concededly not deceptive (*id.* at 23-24). Petitioner places no limits on the Commission's authority to declare business practices to be "unfair" under Section 5.

A. Standards to Be Applied in Determining Whether a Practice Is Unfair Under Section 5.

We do not question that the Commission's authority under Section 5 is indeed broad. However, a review of the legislative history of the 1914 Act, the 1938 amendment, and the Act's enforcement during the 57 years since its enactment makes clear that the Commission's power over practices which are allegedly unfair to consumers is not without reasonable limitations.

1. Legislative History of the 1914 Act.

Petitioner's brief discussion of the legislative history of the 1914 Act (Pet. Br. 18-19) may create the impression

that it was Congress' purpose to give the Commission unlimited authority to declare any business practice unfair. This was, indeed, the fear of some. For instance, on the opening day of the debate Senator Thomas of Colorado stated:

"My construction of this term is that if we enact this measure into a law the commission to be appointed afterwards will have the absolute power, subject only, of course, to the ultimate determination of the legality of the act by the courts, of arbitrarily determining whether any act submitted to it is or is not unfair competition, whether that act is one which involves no competition or one which involves actual competition, and that as a consequence we are imposing upon the business world a condition almost similar to that which resulted during the Middle Ages in a declaration that all unbelief should be heresy." 51 Cong. Rec. 11103 (1914).

The proponents of the bill, however, assured its critics that their fears were unfounded. For example, Senator Cummins, one of the bill's chief sponsors, responded to Senator Thomas that "we do not give to the trade commission an unlimited, unbridled license or authority to declare anything unfair competition." 51 Cong. Rec. 11104.

Undoubtedly, the principal targets of the Act were practices which would lead to antitrust violations or the creation of monopolies. Thus, Senator Newlands, Chairman of the Interstate Commerce Committee, which reported the Senate bill, expressed his belief that "every new condition and every practice that may be invented with a view to gradually bringing about a monopoly" would be covered. 51 Cong. Rec. 12024. The supporters of the bill, however, intended it also to comprehend all clearly unconscionable or unethical practices, not merely those which would produce antitrust violations.

Senator Newlands emphasized repeatedly that while it would be impossible to specify all possible forms of unfair competition, only "practices that are against good morals in trade," 51 Cong. Rec. 11084, or "good morals in business," 51 Cong. Rec. 11108; would be covered. He expanded this to include "every practice and method . . . that is against public morals . . . or is an offense for which a remedy lies either at law or in equity." 51 Cong. Rec. 11112. In response to Senator Sutherland's criticism, Senator Newlands refined his definition:

"The Senator objects to the term 'public morals' or 'good morals' as a test. I think it is a very good test. I think there are certain practices which shock the universal conscience of mankind, and the general judgment upon the facts themselves would be that such practices are unfair." 51 Cong. Rec. 12980.

He then referred to "the numerous fraudulent practices which constitute unfair competition." *Id.*

Senator Robinson, who supported the bill in the Senate Committee on Interstate Commerce and also upon the floor of the Senate, stated that the term "unfair competition" was not limited to palming off but would embrace "every unjust, dishonest, and inequitable practice by which one seeks to unfairly destroy or injure the business of a competitor." 51 Cong. Rec. 11228. He stressed that "[n]ot only has the term 'unfair competition' a meaning fairly well fixed in law and economics, but it is also easily understood by the average business man." Senator Robinson felt that the "distinguishable characteristics" of this term were "oppression or advantage obtained by deception or some questionable means." 51 Cong. Rec. 11231.

Senator Saulsbury, another supporter of the bill, stated that unfair methods of competition would include violations of recognized business standards of fairness:

"Courts have always recognized the customs of merchants, and it is my impression that under the act the commission and the courts will be called upon to consider and recognize the fair and unfair customs of merchants, manufacturers and traders. . . .

. . . Every man in his own business knows when a competitor is pursuing unfair methods. Every professional man knows when a competitor is guilty of unfair, unprofessional, and unethical conduct." 51 Cong. Rec. 11593.

Senator Hollis, the author of the term "unfair methods of competition," stated:

"Nobody defends unfair competition. . . . [Senator Reed] calls it a rascally practice; and that is a good, vigorous description of it. Only the pirates of business, who desire monopoly, have an interest in its continuance. Everybody else wants to have it stopped. The only question is as to the best way of stopping it with the least risk to legitimate business operations." 51 Cong. Rec. 12147.

Senator Colt concluded, in a careful analysis, that the phrase "unfair competition," as used in the bill, was "capable of four different constructions by a court": (1) that it was used in the legal sense, i.e., limited primarily to palming off; (2) that it raised a "moral question," i.e., whether conduct was "disingenuous or tricky"; (3) that the words referred to "transactions regarded as unfair according to the customs and usages of merchants or in trade generally"; and (4) that the law covered all antitrust violations, "and all transactions of a similar nature." 51 Cong. Rec. 13154.

The principal spokesman for the bill in the House was Representative Covington, one of the House Conference managers and chairman of the subcommittee in charge of the bill. In an extensive analysis of the phrase "unfair

methods of competition" after the bill had returned from conference in its final form, Representative Covington explained that it was Congress' purpose to have the Commission, in applying the statute to new and different types of unfair practices, build upon the basic principles of common law which had been developed by the courts. He concluded that:

"... while most of the earlier cases related to the infringement of trademarks, the term may be said now to embrace those unjust, dishonest, and inequitable practices by which one seeks to destroy or injure the business of a competitor." 51 Cong. Rec. 14929.

One of the methods referred to which had been condemned under the common law was interference with or obstruction of the business of a competitor. Quoting from *Nims on Unfair Business Competition* (p. 385), Representative Covington noted that such methods were not limited to interference with a competitor's contract, but also included "many other ways . . . of harassing, interfering with, and obstructing a competitor in such a manner as to amount to unfair competition in the broadest sense of the term." The first case cited by Representative Covington in support of this proposition was *Sperry & Hutchinson Co. v. Louis Weber & Co.* 161 F.219. (C.C.N.D. Ill. 1908), in which, as he stated, "the complainant was held entitled to an injunction to prevent defendant from interfering with its business of issuing trading stamps. . . ." 51 Cong. Rec. 14930. It is indeed ironic that petitioner is seeking to condemn legal action against conduct which Congress considered an unfair method of competition.

The types of practices which Congress intended to be covered by the Act may be grouped into two categories: those which would be in the nature of antitrust violations

and conduct which would be plainly recognizable by the business community and by the public to be dishonest or otherwise inequitable or immoral. In every example given or case cited in the consideration of the legislation, the perpetrator of the act in question had taken some kind of patently unfair and improper advantage of his competitors and/or of the consuming public. The words and phrases used in describing Section 5 all convey an idea of clear unfairness: "practices that are against good morals in trade . . . which shock the universal conscience of mankind"; "imposture"; "vicious practice"; "unjust, dishonest and inequitable"; "foul"; and "fraudulent".

2. The Wheeler-Lea Amendment.

Petitioner incorrectly implies (Pet. Br. 21-22) that the Wheeler-Lea Amendment in 1938 was intended to expand the Commission's power to protect consumers from practices not previously covered by Section 5. While the legislative history of the 1914 Act had focused largely on unfair methods of competition—i.e., unfair acts directed against competitors—the Commission, even prior to the Wheeler-Lea Amendment, devoted a substantial portion of its efforts to practices aimed primarily at consumers.⁸ In the first such case to reach this Court, *FTC v. Winsted Hosiery Co.*, 258 U. S. 483, 494 (1922), it was held that misbranding of goods was an "inherently unfair" method of competition. Although the Court found that competition was injured by the practice since "trade [was] diverted from the producers of truthfully marked goods," the Court recognized that the principal victim was the public. The practices, it stated,

8. In the two fiscal years preceding 1932, 521 out of 572 FTC proceedings, or 91 percent, were concerned with false and misleading advertising, misbranding and misuse of trade names. *Watkins, THE FEDERAL TRADE COMMISSION AND THE ANTITRUST LAWS, THE FEDERAL ANTITRUST LAWS, A SYMPOSIUM* (M. Handler ed. 1932).

were "calculated to deceive and do in fact deceive a substantial portion of the purchasing public. . . . As a substantial part of the public was still misled by the use of the labels which the Winsted Company employed, the public had an interest in stopping the practice as wrongful. . . ." 258 U. S. at 493-94.

In *FTC v. R. F. Keppel & Bro.*, 291 U. S. 304 (1934), decided four years before the Wheeler-Lea Amendment, the sale of merchandise by a lottery scheme had been condemned on the ground that it had been "shown to exploit consumers."

Accordingly, there would have been no need for a change in the statute if the purpose had been to include practices harmful to consumers, since they were already indisputably covered. The only reason for the amendment was to eliminate the technical requirement imposed in *FTC v. Raladam Co.*, 283 U. S. 643, 652-53 (1931), that under Section 5 the Commission must demonstrate that a practice even though clearly injurious to consumers has also "substantially injured or tended thus to injure, the business of [a] competitor or competitors generally." Contrary to petitioner's intimation (Pet. Br. 22), the Wheeler-Lea Amendment did not expand the substantive scope of the acts prohibited under Section 5 but only provided that those acts could be moved against irrespective of whether they had an effect upon competition.

9. The Senate Committee felt that the "necessity of proving that competitors of the offender have suffered monetary damage" placed an unnecessary burden on the Commission. S. Rep. No. 1705, 74th Cong., 2d Sess. 2 (1936). The House Committee pointed out that under the Act, as interpreted, the Commission may have been powerless to act where a person had a monopoly or "where all of those engaging in a particular line of commerce are participating in the same unfair method." H. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937). The Court in *Raladam* had raised this possibility: "Certainly it is hard to see why Congress would set itself to the task of devising means and creating the administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another." 238 U. S. at 652.

In his testimony before the Senate Committee on Interstate Commerce, Federal Trade Commissioner Ewin Davis stressed that the proposed amendment would not increase the power of the Commission but would merely relieve it of the burden of establishing injury to competition resulting from an unfair practice:

"We do not think that [the amendment] increases the power of the Commission at all. We simply think that it defines it in a way that the Commission can proceed without proving competition and injury to competitors, and thus more easily, speedily and economically, and better protect the consuming public and industry. Now, the word 'unfair' is already in the act. So far as the word 'unfair' is concerned, that has been defined hundreds of times in the courts. There are few words which have been more clearly and definitely defined than the word 'unfair' and so far as the word 'deceptive' is concerned, why, that is clear in itself." *Hearings on S. 3744 Before the Senate Comm. on Interstate Commerce, 74th-Cong. 2d Sess. at 52 (1936).*

Senator Wheeler confirmed Commissioner Davis' understanding that the bill conferred no new powers upon the Commission:

"The present bill is a re-enactment of the present law upon the statute books with comparatively few amendments which the Federal Trade Commission has recommended, not for the purpose of adding to their powers but for the purpose of aiding them in carrying out their present powers." 80 Cong. Rec. 6589 (1936).

Because the only purpose of the amendment to Section 5 was to eliminate the necessity of showing injury to competition, no one ever considered the possibility that a claim might be made that it covered different types of practices.

The words "acts or practices" were not used by the Commission in drafting the proposed measure to indicate that different forms of conduct would be covered. As Commissioner Davis testified:

"[T]he courts have very frequently referred to them as 'unfair practices,' and the reports, congressional reports, submitting the bill which became the Federal Trade Commission Act, stated specifically that it was designed to prevent 'unfair practices.' They used that term then, and the Courts have frequently referred to it in the same way. In other words, that is what was meant by 'unfair methods of competition.'" *Hearings on S. 3744, supra*, at 13.

Accordingly, Congress did not intend to give the Commission broadened substantive powers, as petitioner suggests, but merely the authority to challenge the same types of practices against which it had been proceeding for over 23 years—but without having to show competitive injury.

3. Enforcement and Interpretation of Section 5 by the Commission and the Courts.

Petitioner relies upon cases in which the Commission has held that the Act applies to practices which are neither deceptive nor in the nature of antitrust violations. A reading of petitioner's summary of those cases (Pet. Br. 24-25) discloses that in every one the practice challenged was patently and inherently unfair and unethical.¹⁰

Only one such case has reached this Court, *FTC v. R. F. Keppel & Bro.*, 291 U. S. 304 (1934). As petitioner notes,

10. The practices in the cases cited by petitioner include the sale of goods by lottery or other games of chance; the delivery of unordered goods or attempting to force customers to accept substitutes; coercing payments for unordered goods by harassing tactics; refusing to reassemble a furnace which respondent had improperly dismantled; commercial bribery and "payola"; and refusal to return deposits or make refunds.

"[s]ince *Keppel*, this Court has not specifically considered a case, like the present one, in which the claim of unfairness is not based essentially upon alleged deceptiveness" (Pet. Br. 24). In *Keppel* respondent sold candy by means of "break and take" packages whereby customers were induced by the element of chance to make purchases. The Commission had found, among other things, that this was "a lottery or gambling device which encourages gambling among children"; "that in some states lotteries and gaming are penal offenses"; and "that the sale or distribution by lot or chance is against public policy." 291 U. S. at 308. The Court held:

"... the competitive method is shown to exploit consumers; children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. *Such devices have met with condemnation throughout the community.* Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that *the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy.*" 291 U. S. at 313 (emphasis added).

Petitioner also refers (Pet. Br. 19) to Mr. Justice Brandeis' dissenting views in *FTC v. Gratz*, 253 U. S. 421 (1920), which subsequently were accepted by this Court. See *FTC v. Brown Shoe Co.*, 384 U. S. 316, 320-21 (1966). Both *Gratz* (which involved a tie-in practice by a company holding "a dominating and controlling position" in the sale and distribution of the tying product) and *Brown Shoe*, however, concerned anticompetitive practices which conflicted with the basic policies of the Sherman and Clayton Acts. Neither case supports petitioner's contention herein that S&H's

practices should be condemned regardless of whether they violate the letter or policy of the antitrust laws.

In its authoritative statement accompanying the Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes, issued on June 22, 1964, 29 Fed. Reg. 8324 (1964) the Commission listed the factors which it felt should be considered in determining whether a practice (neither in the nature of an antitrust violation nor deceptive) is unfair:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). If all three factors are present, the challenged conduct will surely violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and *if, in addition to be morally objectionable, it is seriously detrimental to consumers or others.*" 29 Fed. Reg. at 8355 (emphasis added).

In a leading decision on its powers in the area under consideration, *Topps Chewing Gum, Inc.*, 67 F.T.C. 744 (1965), the Commission, per Commissioner Elman, stated:

"The prohibition in Section 5 of unfair methods of competition and unfair acts and practices has long been construed to reach not only monopolistic and anticompetitive practices, but also *trade practices that are unscrupulous, oppressive, exploitive, or otherwise indefensible.* Thus, such practices as com-

mercenary bribery, inducing breach of competitors' contracts, physical interference with competitors' goods or property, and industrial espionage are forbidden by Section 5 regardless of whether there has been a general adverse effect on competition." 67 F.T.C. at 841 (emphasis added).

Thus, the Commission as well as the courts have interpreted the Act in a manner entirely consistent with the view expressed during the Congressional debates. Only practices (other than those which are deceptive or in the nature of antitrust violations) which are "inherently unfair," because they have been "long deemed contrary to public policy," "morally objectionable," "unethical," "unscrupulous," "oppressive, exploitive, or otherwise indefensible," have been attacked by the Commission or deemed by it or the courts to be covered by Section 5. The most comprehensive approach which has been adopted for measuring whether or not a practice which is neither in the nature of an antitrust violation nor deceptive should be considered to be unfair within the meaning of Section 5 is that set forth by the Commission itself, as quoted on page 22, *supra*, i.e.: (1) whether the practice is within "the penumbra of some common-law, statutory or other established concept of unfairness"; (2) whether it is "immoral, unethical, oppressive, or unscrupulous"; or (3) whether "*in addition to being morally objectionable, it is seriously detrimental to consumers or others.*" (Emphasis added.)

B. S&H's Actions Were Not Unfair Under Section 5.

Under the standards articulated during the Congressional debates and applied by the Commission and the courts since the enactment of the statute, S&H's efforts to prevent unauthorized dealing in its trading stamps—as evidenced by the institution of legal proceedings and by

letters from attorneys warning in good faith that such actions would be brought—were not unfair acts and practices within the meaning of Section 5.

(1) S&H's actions were obviously not in violation of the common law or any other established concept of unfairness. In contrast to the *Keppel* case, where the practice in question was held to be clearly "of the sort which the common law and criminal statutes have long deemed contrary to public policy," 291 U.S. at 313, S&H's right to protect itself from unauthorized commercial use of its stamps has been uniformly sustained by all of the federal and state courts which have considered the issue.¹¹

The legislative history of Section 5 set forth above makes clear that while Congress did not consider that the Commission should be strictly limited to the common law definition of unfair competition, it believed the Commission should rely on the case law decisions on unfair competition as significant factors in interpreting this section. At a minimum it was intended that the Commission should treat as unfair methods of competition those acts which had been held at common law to be unfair competition. As noted above, one of the practices which the Act was designed to cover was the unauthorized trafficking in trading stamps, held to be "a clear case of unfair competition" in *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 F.219, 222 (C.C.N.D. Ill. 1908). The authors of the legislation undoubtedly would have found it inconceivable that some day a claim would be made that steps taken by S&H to enjoin conduct which was recognized to be unfair at common law would be considered to be unfair under Section 5.

(2) No finding was made by the Commission nor has any claim been made by petitioner that S&H's actions were immoral, unethical, unscrupulous or otherwise unfair in

11. See the discussion of these cases at pp. 40-47, *infra*.

the sense that this word was used in the Congressional debates and has been subsequently applied by the Commission and the courts. S&H's conduct is totally unlike any of the practices referred to by Congress or previously attacked by the Commission.

While the institution of vexatious litigation brought in bad faith has been held to be an unfair practice (see *Chamber of Commerce v. FTC*, 13 F.2d 673, 686 (8th Cir. 1926)), it cannot be said that S&H's litigation was designed to harass or that it was not instituted in good faith in view of the fact that S&H has been uniformly sustained by the courts.

(3) Petitioner has failed to show that the practice of S&H is "unfair" within the meaning of Section 5 as reflected in its legislative history, or its interpretation by the courts and the Commission. Petitioner asks this Court to promulgate some entirely new rule which petitioner has chosen not to define. Petitioner urges that S&H's actions were unfair primarily because they were injurious to consumers by limiting their "freedom of choice in the disposition of trading stamps" (Pet. Br. 28). Reduction of a consumer's freedom of choice, however, cannot in itself be found to be consumer "injury" nor render a practice unfair. Where, as here, there is no violation of the letter or spirit of the anti-trust laws, deception or inherent unfairness, and where the practice is reasonably necessary to fulfill legitimate business objectives, and produces no "substantial" or "seriously detrimental" effect upon consumers or others, such practice cannot be considered to be unfair.

1. S&H's Actions Have Been Reasonably Necessary for the Protection of Its Business and to Prevent Unfair Competition With S&H and Its Retailer Licensees.

The effectiveness of the S&H stamp service in inducing long-term patronage at its licensees' stores depends on the fulfillment of three reasonable conditions: (1) the stamps

may be obtained only at the stores of S&H licensees; (2) the consumer must fill a book of stamps before redeeming them; and (3) to redeem her stamps the consumer must visit an S&H redemption center (unless she does not live within a reasonable distance of a redemption center), where she becomes acquainted with the variety and high quality of merchandise made available and may secure goods which she will thereafter associate with S&H stamps and the stores where she received them.

Unauthorized redemption of and trading in stamps for commercial purposes interfere with every aspect of this system. The consumer may thereby obtain stamps through other sources and therefore need not patronize S&H licensees to secure them. The consumer may dispose of her stamps before filling a book and thus does not have the incentive to return to the stores of the licensees to obtain the additional necessary stamps. The consumer need not visit a redemption center because she may redeem or trade her stamps at a competitive retail merchant or at an exchange, and she does not receive for her stamps the merchandise provided by S&H.

The harm caused to S&H and its licensees by unauthorized trading in and redemption of S&H stamps is particularly obvious in the case of a retail merchant who in competition with an S&H licensee offers to redeem S&H stamps for his own merchandise or to exchange S&H stamps for his own stamps. As the Commission found, the purpose of this activity is "to lure customers" from the S&H retailer into the store of such competitor (App. I, 119).

- The competitor, who has paid nothing for the S&H service, would be able to use the S&H stamps to increase his own business at the expense of the S&H-licensed merchant who has paid for the S&H service. Under the Commission's order the competitor would be free to take the stamps to an S&H redemption center and obtain redemption merchandise which he may then use to redeem more S&H stamps.

As the court below stated: "Upon the basis of exhaustive analysis of the evidence of record and personal observation of the demeanor of the witnesses, the Examiner concluded that serious damage would be visited upon S&H through commercial trafficking in S&H stamps and that the action of S&H alone in stopping that activity was inherently essential to the conduct of the trading stamp business" (App. III, 393-94, n. 6).

Those findings were established by the testimony of Frank P. Rossi, S&H Senior Executive Vice President (App. III, 302-20); Dr. Eugene Beem, S&H Vice President for Corporate Research and Economist (App. III, 345-67); and Dr. Charles F. Phillips (App. III, 376-85).¹² Three witnesses called by complaint counsel and two others called by S&H testified to the same effect (App. III, 176-77, 210, 250-51, 323-24, 370-71). Additionally, Dr. Stewart Lee, who testified as the Commission's economic expert (App. III, 258), agreed that unrestricted trafficking in S&H stamps would be injurious to S&H and its licensees (App. III, 266-67, 276).

As Dr. Phillips noted, the S&H promotional system comprises a circular relationship from S&H to the retailer to the consumer and back to S&H (App. III, 382-84), and "if you break the relationship between the consumer and the redemption center [by allowing commercial trafficking in stamps], you have broken an essential ingredient of this system" (App. III, 384-85).

Witnesses Rossi and Beem explained that when stamp savers can acquire S&H stamps at a trading stamp exchange without patronizing merchants licensed by S&H, the ability of the S&H system to attract customers to the licensee's store is defeated, and the licensee does not receive the kind of program he has paid for (App. III, 314, 353-54). Dr. Beem added that, when consumers dispose of their stamps

12. The hearing examiner noted that he "was impressed with the candor of respondent's officials and with their experience in the trading stamp business. Thus, he credited their opinion of the effects which would flow" from unauthorized commercial trafficking in S&H stamps (App. I, 80 n.14).

at an exchange and thus fail to visit the S&H redemption center, S&H loses the consumer appeal which comes when the stamp saver is exposed to the variety and quality of S&H redemption merchandise, the attractive S&H redemption store and its courteous personnel (App. III, 356). "This," as Dr. Beem put it, "is what sells the Sperry and Hutchinson program" (*id.*).

The Commission brushed aside the evidence as to the validity of the reasons for S&H's actions on the ground that it consisted of "testimony from its own officers and employees," "in broad generalities" and without supporting "hard facts" (App. I, 172).

The testimony supporting S&H's position was in fact not limited to "its own officers and employees." Dr. Stewart Lee, the Commission's expert witness, agreed that "from the point of view of the retail licensee who pays for the stamps, you have to have a system under which he gets the use of it but his competitor does not" (App. III, 266-67); that "to make that business a success, it has to be so regulated that the stamp will be used as a magnet to draw the housewife into the licensees' stores over and over and over" (App. III, 267); and that it "would be reasonable" for S&H to conduct its business so that its redemption merchandise could be obtained only by those who patronize S&H licensees and not by those who patronize others (App. III, 276).

Morris Rance, a trading stamp exchange operator called by Commission counsel, admitted that his business eliminated the necessity for stamp savers to patronize S&H licensees to get S&H stamps (App. III, 176-77). Nelson Freeman, an S&H licensee called by Commission counsel, testified that S&H's service would not be worth very much to him if he paid for the stamp service and the consumer could take the S&H stamps instead to another retailer for redemption (App. III, 210).

Another S&H licensee called by Commission counsel, Samuel Caplan, testified that for the consumer to take his stamps to another retailer for redemption would be objectionable since the latter "had no hand in this transaction. He would be profiting from something that he didn't make possible at all" (App. III, 250). Later he testified that he would feel that if his customers "could go across the street and get the S&H Green Stamps" at a trading stamp exchange he "would be deprived of part of what [he] had been paying The Sperry and Hutchinson Company for" (App. III, 250-51). Morris Lewis, an S&H licensee, testified that trading stamps "would lose a great deal of [their] advantage" if customers could swap or purchase S&H stamps at a trading stamp exchange (App. III, 323).

Still another S&H licensee, Frank McDonald, owner of a supermarket chain in Tennessee, who had experience with a competitor offering to exchange S&H stamps for his own brand of stamps (App. III, 369), testified that the effect of this activity was to "damage our business, and hence the impact was a serious one as far as we were concerned" (App. III, 371). He added that the competitor "was trying to tear down" and detract "from something that we had paid for with good money, exclusively, and we felt he had no right to participate in any gains thereby from it" (App. III, 372).

The Commission's efforts (App. I, 172) to denigrate S&H's expert witnesses were utterly without justification. Dr. Charles F. Phillips, then President of Bates College, is one of the country's leading experts in marketing, consumer motivation and trading stamps. His publications, the titles of which filled 10 pages of the record (App. II, 578-87), consist of 13 books, including four leading textbooks on marketing, and over 96 articles. Dr. Eugene Beem, Vice President for Corporate Research of S&H, who had formerly been Assistant Professor of Business Administration at the Uni-

versity of California, has devoted a substantial portion of his professional life to the study of consumer motivation as it relates to trading stamps (App. III, 345-47). Their testimony, far from constituting "broad generalities," was precise, to the point and consistent. At the hearing Commission counsel offered no contrary evidence. The Commission's failure even to consider this testimony was clearly erroneous.

The Commission in its opinion and petitioner (Pet. Br. 32) make much of what they term S&H's failure to offer what they call "hard facts" to support S&H's position. Petitioner points to the lack of testimony of business actually lost by S&H licensees because of a trading stamp exchange. The fact of the matter is, however, that commercial trafficking in trading stamps has been held unlawful and has been enjoined by the courts ever since the first attempts to engage in this conduct 67 years ago. Therefore, as the Commission agreed, there was no way in which S&H could have introduced "hard facts," in the sense of actual losses of business, "to show what would be the effect if such operations were continued over a period of time" (App. I, 172).

The Commission, while conceding the impossibility of demonstrating by actual experience what the effects of unauthorized trafficking would be on S&H's business, ignored both S&H's and the Commission's witnesses and, by selecting and distorting isolated bits of evidence in the record, arrived at the erroneous conclusion that such trafficking would not be detrimental to S&H.

The speculative character of this conclusion is exemplified by the Commission's reliance upon the fact that S&H doubled the size of its Fort Worth warehouse in 1964 as the basis for its non sequitur, which petitioner repeats in its brief (Pet. Br. 33), that "the evidence seems to indicate" an increase in S&H's business in the Oklahoma-Texas area "where trading stamp exchanges did do business with some

regularity before their operations were curtailed" (App. I, 172-73). The fact is that well before the expansion of the warehouse the courts of Oklahoma and Texas had enjoined the unauthorized trafficking in S&H stamps.¹³ As a consequence, S&H's business was protected from injury by trading stamp exchanges in that geographic area. Moreover, it clearly does not follow from the fact that S&H's business may have increased in the Texas-Oklahoma area that unauthorized dealings in its stamps would not harm S&H. As this Court said in *Utah Pie Co. v. Continental Baking Co.*, 386 U. S. 685, 702 (1967), the fact that a company has "increased its sales volume" does not mean that it has not been injured by unlawful practices. The Commission's conclusion disregards an almost unlimited number of other possible reasons to account for the addition to the warehouse.

The Commission also erroneously relied upon the assumptions (a) that there is "a great deal of exchanging of stamps between individuals" (App. I, 173); there "is evidence, for instance, that in 1960 some 20 percent of the stamps issued were exchanged by housewives on an informal basis" (App. I, 120); and there "is no evidence that such exchanges have been damaging" or "why the effect should be any different where the exchange is made through a commercial exchange"; and (b) that S&H encourages pooling of its stamps for charitable purposes which, said the Commission,

13. Thus, the Supreme Court of Oklahoma held that William Rance's trading stamp exchange was a "wrongful and unwarranted interference with plaintiff's business," and it affirmed a 1962 injunction restraining trafficking in S&H stamps. *Rance v. Sperry & Hutchinson Co.*, 410 P. 2d 859 (Okla. Sup. Ct.), *cert. denied*, 382 U. S. 945 (1965). In Texas, the court held that the operation of a trading stamp exchange "unlawfully interferes" with contracts between S&H and its licensees, and it enjoined the trading stamp exchange from trading in S&H stamps. *Sperry & Hutchinson Co. v. Hinds*, District Court of Dallas County, Texas, No. 55,615-D, March 15, 1961 (unreported) (App. II, 555-58).

reduces or eliminates "some of the various elements which" S&H "claims are essential to the effective operation of its business" (App. I, 173).

The Commission completely misread the evidence concerning informal exchanges of stamps by housewives. The only evidence on the subject was a survey taken in 1960 (App. III, 513) which revealed that only 20 percent of the persons questioned "*ever* exchange stamps." The indication that 20 percent of stamp savers might *at some time* exchange stamps cannot mean, as the Commission says, that "in 1960 some 20 percent of the [S&H] stamps issued were exchanged" (App. I, 120, 173). The Commission's misinterpretation was relied upon in reaching its erroneous ultimate conclusion that the exchanges were not damaging to S&H, and the error has been perpetuated by petitioner (Pet. Br. 34).

S&H's program of encouraging the pooling of its stamps for charitable purposes in no way supports the Commission's finding that commercial trafficking in its stamps causes no injury to S&H. Contrary to the Commission's assumption, the remembrance value of the redemption merchandise and the continued patronage of S&H licensees are both very much a part of the program when S&H assists, for example, a hospital group to obtain an ambulance. The program is limited to the pooling of S&H stamps which S&H then redeems; no swapping of other stamps or outside redemption is involved. In addition to the good public relations inherent in the program, more consumers are attracted to S&H licensees in order to acquire stamps for the charitable program (App. III, 344). Thus, the pooling program and its effects on S&H are quite different from commercial trafficking, and that program offers no support for any conclusion concerning the effect of commercial trafficking on S&H's business.

The failure of the Commission to support its erroneous conclusion with findings or reference to any substantial

evidence is not cured by petitioner's brief here. Petitioner argues from a study indicating that the "availability of stamps [plays] a comparatively minor role in influencing consumer choice", that S&H's business "would not be seriously affected" if S&H stamps were indiscriminately available (Pet. Br. 34-35). If "about 16 percent" of consumers now "go out of their way to get the stamps they save" (Pet. Br. 34), fewer would do so if they could secure them other than at S&H licensee-retailers or secure competitive stamps freely convertible into S&H stamps. Obviously, such a lessening of the effectiveness of the promotion would seriously injure S&H licensees and cause many of them to give up the S&H service.

As the court of appeals observed, the exchanging of stamps by trading stamp exchanges and retailers would have the effect of making "all stamps interchangeable" and reduce the effectiveness of S&H stamps "as against other trading stamp companies," thereby "restrain[ing] competition between S. & H. and other stamp companies" (App. III, 393-94). The court declared that "[s]uch restructuring of the industry to eliminate competitive distinctions and to reduce all competitors to a common level is exactly what the Supreme Court condemned in *Federal Trade Commission v. Sinclair Refining Company*, 261 U. S. 463, 475 (1923)" (App. III, 394).

The Commission did not even consider the effect of its proposed order on competition among trading stamp companies. If it had done so, it could only have found that if stamps became interchangeable trading stamp companies would no longer be able to compete with each other at the level at which competition is most meaningful, i.e., in the promotion of their licensees' sales. The court below correctly pointed out this failure of the Commission in its decision.

2. S&H's Actions Were Not Unfair to Consumers or Others

(a) Consumers

As we have noted, the principal ground urged by counsel for petitioner in seeking to reinstate the Commission's order is that S&H's actions were "unfair to consumers." In attempting (Pet. Br. 28-29) to demonstrate this alleged unfairness, however, counsel rely not on the findings of the Commission¹⁴, which were not directed to the consumer, but entirely on their own rationalizations as to how the consumer might be hurt.

Petitioner does cite (Pet. Br. 28) the only mention of the consumer in the opinion which was a passing reference to the examiner's finding that S&H's actions had "disadvantaged the stamp collecting consumers who did not have, after [S&H's] actions, the same freedom of choice in the disposition of trading stamps" (App. I, 176).¹⁵ The examiner recognized that this "freedom of choice" was a mere "convenience" for the consumer which did not outweigh the legitimate purpose of S&H's policies (App. I, 78):

The Commission could not have regarded this limitation on the consumer's rights to be of any particular significance, because it never again alluded to it. It was not the basis of the Commission's decision, since the Commission deemed it "essential . . . to determine whether or not there has been or may be an impairment of competition" (App. I, 175).

14. In its findings of fact the Commission made no mention of the effect of S&H practices on the consumer except its ultimate finding that the effect of S&H's actions was "to the detriment of [retailers and trading stamp exchanges] and the consuming public" (App. I, 126). Petitioner rightfully placed no reliance upon that naked ultimate conclusion and did not cite it in its brief.

15. In fact, the examiner's finding was that, after S&H's actions, the stamp collector had "*less of a choice . . . than she would have had if she could have used the stamps as currency anywhere she chose*" (App. I, 73) (emphasis added). The fact that trading stamps may not be used as currency does not mean that the limitations placed by S&H on the use of its trading stamps are not reasonable.

On appeal, counsel have asked this Court to undertake a burden which the Commission itself did not assume: to find that the limitation of consumer choice mentioned by the examiner injured the consumer and to conclude that injury to consumers alone could be a proper basis for the Commission's decision.

Without benefit of Commission findings, counsel first contend that consumers are prevented from deriving "full value" or "maximum value" from their stamps (Pet. Br. 16, 28). That the consumer who fills a book of stamps and redeems it in the prescribed manner receives full value for her stamps is clear and undisputed. The Commission found (App. I, 106, 109) and counsel agree (Pet. Br. 5, n. 4) that the average retail value of a book of stamps when redeemed at an S&H redemption center is \$3.00, an amount considerably greater than the average price per book (\$2.68) which the merchant pays for the stamp service.

Thus, to obtain full value for her stamps a consumer need only (1) fill one book of S&H stamps and (2) redeem them from S&H at a redemption center or by mail. Both of these requirements may be easily fulfilled. Since there are over 70,000 retail outlets issuing S&H stamps (App. I, 104), all consumers have an ample opportunity to fill a book of stamps within a reasonable period. Furthermore, as there are "over 850 redemption centers" maintained by S&H throughout the country and "[s]tamp savers who are not located near a redemption center may redeem stamps by" mail (App. I, 108), no saver would be prevented from redeeming S&H stamps wherever she may move.¹⁶ At an S&H redemption center she is able to select from over 2,000 available articles (App. I, 108), encompassing a wide range

16. Counsel for the petitioner themselves refer approvingly in their brief to the "quality of [S&H's] merchandise and its nationwide operations" (Pet. Br. 35).

of items, including such basic necessities as clothing, furniture and household goods.

Accordingly, while the consumer may not have absolute "freedom of choice" to dispose of her stamps as if they were currency, she is not prevented from realizing full value for them. Concededly, it may occasionally be more convenient for a stamp saver to redeem S&H stamps at a nearby merchant rather than go to an S&H redemption center. Or she may prefer to obtain a different item than one of the over 2,000 made available by S&H which the examiner found to be of "high quality" and "made by well-known, reliable, manufacturers" (App. I, 97). But there is a vast difference between this type of inconvenience and the "serious detriment" which must be found before a practice may be considered to be unfair. As the examiner properly concluded, "Section 5 of the Federal Trade Commission Act does not empower the Commission to exercise its powers solely for convenience of consumers—only to prevent unfair acts and practices" (App. I, 78).

In support of its contention that *any* limitation of the consumer's disposition of trading stamps is improper, petitioner suggests, also without benefit of Commission findings or record support, that trading stamps "ordinarily" raise the price of merchandise (Pet. Br. 28) and therefore, since the consumer indirectly pays for trading stamps, she should have the right to use them as she chooses. The uncontroverted evidence of record, however, established that "[t]here is no evidence that trading stamps are ordinarily accompanied by price increases" (Tr. 6465-66; *see also* Tr. 6470, 6601).

Petitioner further argues that if trading stamp exchanges and others were permitted to redeem and exchange S&H stamps, a higher percentage of S&H stamps would be redeemed and consumers as a whole would thereby derive greater values from their stamps (Pet. Br. 28-29).

Underlying this conjecture is the improper inference that 14 percent of all S&H stamps are never redeemed.¹⁷ The fact is that although 14 percent of all stamps issued by S&H through the end of 1964 were still outstanding as of December 31, 1964 (App. I, 109), some 13 percent of all S&H stamps were issued in 1964 alone (App. II, 433-34), and the bulk of those stamps would not ordinarily be redeemed until the following year (Tr. 6279). Accordingly, the actual redemption rate is unquestionably at the top of the 86 percent to 95 percent range which the Commission found for S&H trading stamp redemptions (App. I, 109). Furthermore, there is no support in the record for the claim that a higher percentage of S&H stamps would be redeemed by consumers if they could be freely transferred, and the Commission made no such finding. There was no showing that consumers who do not now save or redeem S&H stamps would collect such stamps for redemption or exchange them at trading stamp exchanges or other outlets. Finally, as the examiner found, "[u]nredeemed stamps do not represent a 'windfall' to S&H. Competition requires the Company to pass on to its stamp savers and to its licensees the savings represented by the unredeemed stamps" (App. I, 95).¹⁷

In brief, the requirements of the S&H system are clearly reasonable. Whatever added convenience the consumer may be able to derive from the ability to redeem or trade her stamps at a competitive retailer or at a trading stamp exchange is more than outweighed by the fact that such activity would serve to defeat the promotional value of trading stamps.

17. Petitioner asserts that unredeemed stamps represent an "obvious advantage" to S&H and implies that S&H seeks to increase this "waste" (Pet. Br. 36-37). In fact, as the examiner found: "As a matter of policy, the Company makes every effort to encourage and facilitate redemptions because it believes that a high rate of redemptions is important to the continued participation of retail merchants and their customers in its trading stamp service" (App. I, 41).

(b) *Retail Merchants and Trading Stamp Exchanges*

In the course of its attempt to elevate minimal inconvenience to consumers to the level of unfairness under Section 5, petitioner also briefly urges that S&H's practices are unfair to trading stamp exchanges and to retailers who offer to redeem stamps for their merchandise (Pet. Br. 29-31). S&H's attempts to prevent unauthorized use of its stamps have not unfairly curtailed the legitimate business operations of merchants at any level.

The Commission found that certain retail merchants, not authorized licensees of S&H, had sought to "lure customers into their stores" by offering to redeem S&H stamps with merchandise or to trade their own stamps for S&H stamps (App. I, 119). This, it found, was "a practical and effective response to stamp competition" and "might" even be the "most effective response" to such competition (App. I, 178). Petitioner's brief defends retailers who engage in such practices by asserting, without the aid of any Commission finding, that they "perform a valuable service to the consuming public" (Pet. Br. 30).

Obviously, the use of the promotional attraction of the S&H system without paying for it may be an "effective" way to "lure" consumers away from S&H's licensees,¹⁸ just as any interference with a competitor's business and contractual obligations may be an "effective" response to his competition. Fortunately, however, the courts recognize that such practices constitute unfair methods of competition which should be enjoined. It is no answer to say that such practices are "effective."

18. For this reason it is equally obvious that S&H's licensees are hurt by this activity. The Commission's findings that on the one hand such conduct was effective in benefiting competitors at the expense of S&H licensees and that on the other hand it did not injure S&H cannot be reconciled.

According to petitioner, the availability of trading stamps plays "a comparatively minor role in influencing consumer choice" (Pet. Br. 35). Since many other and equivalent methods of competition (including price reductions, other promotions and other trading stamps) are available to unlicensed retail merchants, a retailer who is restrained from unfairly interfering with the S&H system can nonetheless compete effectively, but fairly, with S&H licensees. Under these circumstances, S&H's practice of seeking the aid of the courts to protect its business from the illegitimate competition of such merchants is not unfair. *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967); *Topps Chewing Gum, Inc.*, 67 F.T.C. 744, 840-41 (1965).

Counsel's assertion that retailers who offer merchandise or their own stamps in exchange for S&H stamps "perform a valuable service to the consuming public" (Pet. Br. 30) would be no excuse for unfair competition even if it were true (and the Commission itself made no such finding). Any unfair competitor, whether he is stealing trade secrets, palming off his products as those of another or interfering with the business of other merchants, may perform a service or satisfy the immediate needs of consumers who trade with him, but his unscrupulous conduct is nonetheless unlawful if it violates the rights of others.

Although S&H has been charged with unfairly suppressing the operations of trading stamp exchanges, it is, as the court below observed, "court action" which "has no doubt injured the businesses of traffickers" (App. III, 391). *Every* successful court action to enjoin an unfair business practice may injure the business of the firm engaged in such practice, and, if the firm is engaged solely in the unfair practice, may destroy it.¹⁹ *See Slough v. FTC*, 396 F. 2d 870, 872 (5th Cir. 1968), *cert. denied*, 393 U.S. 980 (1968), where it was

19. It should be noted, however, that S&H has never sued to stop trafficking in any stamp but its own.

held that a person engaged in an unfair method of competition cannot object to a cease and desist order prohibiting such conduct on the ground that the order would prevent him from continuing in business.

The essential question, therefore, is not whether the exchange operators were injured, but whether the activities in which they were engaged were unfair and consequently unlawful. If, as we have urged, the conditions placed by S&H on the use of its stamps are reasonably necessary to fulfill the promotional purposes of the S&H system, it follows that the operations of the trading stamp exchanges, which induce and participate in the breach of these conditions, are improper. It is for this reason that these activities have been uniformly condemned by the courts.

3. The Legitimacy of S&H's Actions Has Been Uniformly Recognized By State and Federal Court Decisions. The Commission Erroneously Ignored These Decisions Upholding S&H's Right to Injunctive Relief Against Unfair Competition.

From 1904 to 1966, S&H was a party to 43 actions in 19 states and eight federal districts brought to restrain the unauthorized use of trading stamps by retailers, trading stamp exchanges and others, and each case resulted in an injunction against the defendant. In addition to unanimous condemnation by the courts, unauthorized trafficking in trading stamps has been outlawed by statutes of four states.²⁰

The facts relied upon by the courts in enjoining the unauthorized use of S&H stamps are the same as those shown on the present record. Thus, the courts have found that unauthorized trafficking in S&H stamps destroys the effectiveness of the S&H franchise and tends to eliminate the inducement for merchants to deal with S&H, *Sperry & Hutchinson*

20. Cited at p. 5, *supra*.

Co. v. Temple, 137 F. 992 (C. C. D. Mass. 1905); prevents the trading stamp company from "establishing a closer and continuous relation" with its stamp savers, *Sperry & Hutchinson Co. v. Siegel, Cooper & Co.*, 309 Ill. 193, 202, 140 N.E. 864, 867 (1923); tends to interrupt the continuous patronage of S&H licensees by stamp savers, *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 F. 219, 221 (C. C. N. D. Ill. 1908); *Rance v. Sperry & Hutchinson Co.*, 410 P.2d 859 (Okla. Sup. Ct.), *cert. denied*, 382 U.S. 945 (1965); *Sperry & Hutchinson Co. v. Berkeley*, 44 Misc.2d 331, 253 N.Y.S. 2d 700, 702 (Sup. Ct. 1963), *aff'd*, 254 N.Y.S. 2d 231 (4th Dept. 1964), *appeal denied*, 15 N.Y.2d 486, 207 N.E.2d 622 (1965); and interferes with the contracts between S&H and its licensees, *Sperry & Hutchinson Co. v. Louis Weber & Co.*, *supra*; *Rance v. Sperry & Hutchinson Co.*, *supra*; *Sperry & Hutchinson Co. v. Berkeley*, *supra*. These cases reveal that under facts identical to those before the Commission in this proceeding the unauthorized commercial use of S&H stamps has been found to constitute unfair competition and declared unlawful.

In *Rance*, the most recent of the reported decisions involving the unauthorized use of S&H's stamps, S&H sought to enjoin William Rance from trafficking in S&H stamps at his trading stamp exchange. Rance contended that stamp collectors acquire title to the stamps, that the stamps are articles of commerce, and that S&H's attempt to reserve title to, and restrict the transferability of, its stamps was an unlawful restraint of trade under common law principles and state and federal antitrust laws. In rejecting those contentions, the Oklahoma Supreme Court cited with approval numerous decisions holding in effect that trading stamps were unlike typical articles of commerce or negotiable instruments, and that limitation of their transferability is valid. Trading stamps were recognized to be a promotional device whose effectiveness would be destroyed

if they could be used commercially without restriction. The unauthorized commercial use of S&H stamps was found to be "so inconsistent with the purposes for which the same were issued, and so destructive to a legal method of doing business, that such action should be enjoined." 410 P.2d at 869.

In another recent decision, *Sperry & Hutchinson Co. v. Berkeley, supra*, the court enjoined defendant's trading in S&H stamps, noting that "[t]he restrictions of the various stamp companies against the transferability of their respective trading stamps have been uniformly enforced by the Courts," and held that the trading in S&H's stamps "unlawfully interferes with the fulfillment of its contract with its licensees and their customers," and "constitutes unfair competition." 253 N.Y.S.2d at 703.

These cases and statutes clearly represent an unequivocal expression of public policy among the states which the Commission should have considered. *Asheville Tobacco Board of Trade, Inc. v. FTC*, 263 F.2d 502, 512 (4th Cir. 1959). The Commission's opinion, however, reveals that no analysis was made nor any consideration given to the law of these cases (nor the statutes), despite the fact that they form an important part of the law of unfair competition which the Commission itself is enjoined to apply in interpreting Section 5 of the Act, as noted in Point IIA dealing with the legislative history of the Section.²¹

Petitioner attempts to fill the void in the Commission's decision with several irrelevant arguments. First, petitioner states that "federal regulatory authority is not necessarily bound by inconsistent state law" (Pet. Br. 38).

21. Petitioner's intimation (Pet. Br. 39, 42) that the Commission actually considered those decisions and concluded to take action despite them is inaccurate and is not supported by petitioner's reference to "App. I, 149." The fact is that the Commission never considered the law of unfair competition as found in those cases.

S&H has never contended, however, nor did the court of appeals hold, that any or all of the authorities upholding S&H's position foreclose the Commission.²² The point is that, together, they form a body of law in which the courts have recognized, both before and after the passage of the Act, that unauthorized commercial use of trading stamps is an unfair, unjust and inequitable trade practice. The Commission, as any other administrative tribunal, may not simply ignore such a body of law, particularly when it is so important to a proper interpretation of the Act which the Commission was created to administer.

Petitioner next contends that there is "no uniform policy among the states approving restrictions on the use of trading stamps" (Pet. Br. 39). As far as restrictions on the unauthorized use of stamps are concerned (which is the only issue raised by this petition), petitioner is dead wrong: Naturally, trading stamp companies, like other businesses whose contractual obligations are to be performed in the future, have been the subject of regulatory legislation governing their operations. No state, however, has ever permitted commercial trafficking in trading stamps by retailers and brokers attempting to take a free ride on the trading stamp system. To the contrary, for nearly seventy years every state in which the question has arisen, whether in its courts or in its legislature, has emphatically declared such trafficking to be unfair and unlawful.

Petitioner also argues (Pet. Br. 39) that state courts simply determine "the rights of parties to private litigation."

22. Petitioner's second "Question Presented" (Pet. Br. 2) asks "Whether decisions under state law . . . foreclose the Commission from declaring such restraints to be unfair within the meaning of Section 5." The court of appeals' decision neither holds nor suggests that the Commission was foreclosed by such decisions, and petitioner, in the body of its brief, never again mentions any such foreclosure. Thus, the petitioner's second "Question Presented" does not encompass an issue properly to be considered by this Court.

tion" while the Commission acts in "the public interest." This distinction is invalid under our system of jurisprudence, as this Court has recognized. *Garner v. Teamsters Local 776*, 346 U. S. 485, 500 (1953). State courts, particularly when exercising equity injunction powers as in the 43 cases involving S&H, also act in vindication of the public interest. "A court of equity will not use its power to produce a result contrary to public policy. . . ." *Columbia Auto Loan, Inc. v. Jordan*, 196 F.2d 568, 571 (D.C. Cir. 1952). Furthermore, the state statutes prohibiting unauthorized use of stamps are, of course, clear expressions of the public interest. It could hardly further the public interest to have the Commission promote activities which have been condemned as unlawful and unfair competition by every court and legislature which has passed on the matter since the beginning of the trading stamp industry over seventy years ago.

Petitioner further argues that some of the court decisions involved the reissuance of S&H stamps by unlicensed merchants, a practice which S&H would still have the right to prevent under the Commission's order (Pet. Br. 41-42).²³ Again, however, the distinction emphasized by petitioner (and by the Commission in its order) is meaningless, and the courts have never distinguished between the two practices. It makes little difference whether an unlicensed merchant offers to redeem S&H stamps for his merchandise or attempts to reissue the stamps to his customers after he acquires them. In either case, the unlicensed merchant is attempting to take a free ride on the S&H system at the expense of licensees who have paid for it, and in either case he has damaged S&H's ability to perform its contracts with its licensees.

23. In fact, one of the "reissuance" cases cited by petitioner, *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 F. 219 (C.C.N.D. Ill. 1908), actually involved redemption by a retailer of S&H stamps in exchange for his own stamps.

While the many cases to which S&H has been a party, together with state laws which have been enacted, represent a clear expression of public policy regarding unauthorized trafficking in trading stamps which extends back to antedate the Federal Trade Commission Act itself, it should be emphasized that, in arriving at their decisions, the courts have not applied special rules unique to trading stamps. The same principles of unfair competition have been applied in other cases bearing striking similarities to the unauthorized use of S&H stamps. See *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236 (1905); *Addison-Wesley Publishing Co. v. Brown*, 207 F. Supp. 678 (E.D.N.Y. 1962); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Meyer v. Hurwitz*, 5 F.2d 370 (E.D. Pa. 1925), *aff'd*, 10 F.2d 1019 (3d Cir. 1926).

Limitations on the transferability of trading stamps are also not unique. The right of railroads to insist on the nontransferability of and prevent the unauthorized commercial trafficking in their tickets was upheld in *Bitterman v. Louisville & N.R.R.*, 207 U. S. 205 (1907); *Nashville, C. & St. L. Ry. v. McConnell*, 82 F. 65 (C.C.M.D. Tenn. 1897); *Kirby v. Union Pac. Ry.*, 51 Colo. 509, 119 P. 1042 (1911); *Schuback v. McDonald*, 179 Mo. 163, 78 S.W. 1020 (1903), *appeal dismissed*, 196 U. S. 644 (1905); *Post v. Chicago & N.W.R.R.*, 14 Neb. 110, 15 N.W. 225 (1883); *Eastman v. Maine Cent. R.R.*, 70 N.H. 240, 46 A. 54 (1900); and *Lytle v. Galveston, H. & S.A. Ry.*, 100 Tex. 292, 99 S.W. 396 (1907).

Courts have similarly enforced restrictions on the trafficking in theater and other amusement tickets by unauthorized persons, even to the extent of affirming the right to refuse admission to persons who bought tickets from such unauthorized persons. *Collister v. Hayman*, 183 N. Y. 250, 76 N.E. 20 (1905); *Levine v. Brooklyn National League Baseball Club*, 179 Misc. 22, 36 N.Y.S. 2d 474 (Sup. Ct.

1942). Concerning the non-transferability of coupons, see *People v. Berger*, 142 Misc. 178, 254 N.Y.S. 136 (Gen. Sess. 1931).

In *Bitterman*, defendants were ticket brokers who had acquired and resold unused return trip portions of reduced rate railroad tickets issued to travelers attending large conventions in New Orleans. This Court, after citing with approval one of the cases upholding S&H's right to obtain injunctive relief against unauthorized trafficking in trading stamps, *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 F.800 (C.C.D.R.I. 1904), affirmed the railroad's right to prevent the unauthorized trafficking in its tickets. The Commission attempted to distinguish *Bitterman* and the theater ticket cases on the ground that they "involve public interest considerations such as rate regulation and abuses of ticket speculation" (App. I, 174 n.19). It is clear from the opinion, however, that the Court decided *Bitterman* upon the principle that "an actionable wrong is committed by one who 'maliciously interferes in a contract' " specifying that railroad tickets shall not be resold, in "disregard of the rights of a carrier, causing injury to it, which the business of purchasing and selling non-transferable reduced rate tickets of necessity involved." 207 U.S. at 222-23. In none of the railroad cases was "rate regulation" a significant factor, and the "abuses" of stamp speculation are no less reprehensible than those of ticket speculation.

The crucial element of unfairness found in the foregoing cases is that each defendant went far beyond mere copying of the plaintiff's product, as was the case in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting Inc.*, 376 U.S. 234 (1964), cited by petitioner, and actually interfered with the plaintiff's contracts and business relationships thereby frustrating his ability to conduct his business successfully.

Unauthorized users of S&H stamps operate in just such a manner; they interfere with and reduce the value of S&H's franchise agreements. Their activities constitute "a clear case of unfair competition." *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 F. at 222. See also *Sperry & Hutchinson Co. v. Berkeley*, 253 N.Y.S.2d at 703.

It seems inconceivable that the enforcement of the common law right to enjoin interference with one's business relations by others can be held to violate Section 5 when such right is exercised by a trading stamp company as distinguished from a railroad, a theater or an issuer of coupons. Of course, a person engaged in unauthorized trafficking in trading stamps is hurt in his "business" of trafficking just as the defendant in *Bitterman* was hurt in his "business of purchasing and selling non-transferable reduced rate tickets." 207 U.S. at 223. Such "business" activities, however, are not protected by Section 5, inasmuch as they are unfair and subject to injunction under common law.

POINT III

Petitioner improperly seeks to reinstate the Commission's order on a basis not relied upon by the Commission.

Petitioner asks this Court to reinstate the Commission's order on a ground not relied upon by the Commission, namely, that S&H's activities were "unfair to consumers, regardless of whether they also are anticompetitive" (Pet. Br. 15). To do so would violate the principle that "[the Commission's] action must be measured by what the Commission did, not by what it might have done." *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943). A review of the Commission's findings 60-88 (App. I, 119-126) will satisfy the Court that the Commission was not dealing with the

effect of S&H's practices on consumers, but rather with their competitive effect on trading stamp exchanges and on merchants competing with S&H-licensees. Only in the ultimate finding is there the conclusory statement, without supporting findings, that S&H acted to the "detriment of the persons engaged therein [exchanges and competing merchants] and the consuming public" (App. I, 126).

In *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962), this Court said:

"... unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."

"... The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself. . . ."

If any conclusion is certain, it is that the Commission did not articulate the alleged harm to consumers on which petitioner now relies as the basis for its request that the Commission's order be reinstated.²⁴ For the reasons stated, this Court should refuse to review this case on a basis not relied upon by the Commission.

24. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), in which this Court reiterated that "*post hoc*" rationalizations "have traditionally been found to be an inadequate basis for review," 401 U.S. at 419, and in which Mr. Justice Black, in concurring, referred to "some too-late formulations, apparently coming from the Solicitor General's office." 401 U.S. at 422. See also *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-44 (1965); *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969).

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-70

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE SPERRY AND HUTCHINSON COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

This reply brief answers respondent's contentions regarding (1) the basis of the Commission's decision, (2) the legislative history of Section 5 of the Federal Trade Commission Act, and (3) the evidence upon which the Commission based its judgment.

I. THE BASIS OF THE COMMISSION'S DECISION

Citing *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, respondent urges this Court to view the Commission's decision as resting solely on the basis that S&H's suppression of trading stamp exchanges and retailers' redemption activi-

ties restrained competition (Resp. Br. 9-11, 47-48). According to respondent, the Commission now "argues for the first time" in this Court that S&H's practices "should be condemned because they are unfair to consumers" (*id.* 6-7). We submit that examination of the Commission's findings and opinion, particularly in light of the course of these proceedings, leaves no doubt that the Commission issued its order not only because of the effect of S&H's activities on trading stamp exchanges and retailers, but also because S&H's practices were unfair to consumers.

From the outset it has been clear that S&H's practice of suppressing trading stamp exchanges and retailers' redemption activities was challenged because of its unfairness to consumers. Count III of the complaint charged that S&H's activities had the following adverse consequences for members of the public (App. I, 9):

(a) To suppress independent trading stamp exchanges, unfairly to the detriment of the persons engaged in such business or activity and *unfairly to the detriment of the members of the consuming public* who have thereby been deprived of the opportunity of exchanging one type of trading stamp for another in order to facilitate their redemption;

(b) To deny to the public the opportunity to redeem such stamps through persons other than the respondent, *to the injury of both the public and such other persons;*

(c) *To interfere unjustly, oppressively, and unreasonably with the right of the consuming*

public to enjoy the full use of their personal property and to transfer, alienate, or otherwise deal with such personal property as they see fit. [Emphasis added.]

Throughout these proceedings both sides have argued vigorously about consumer injury,¹ and the hearing examiner, after recognizing that Count III of the complaint charged unfairness to the public (App. I, 69-70), found that S & H's suppression of trading stamp exchanges had limited the alternatives of consumers and had placed consumers at a disadvantage (*id.* at 73).

The Commission found that S & H had prevented retailers from using an effective competitive device in competing with trading stamp company redemption centers, that it had curtailed the operations and competitive responses of a whole class of small businessmen, that the effect of such suppression had been to the detriment of the businessmen affected *and of the consuming public*, and that the practices were therefore "to the prejudice and injury of the public" (App. I, 125-126). The Commission adopted the examiner's findings on injury to consumers (App. I, 176):

Of course, the Commission's whole opinion does not revolve about the unfairness to the consumer of S & H's having suppressed trading stamp exchanges and competitive trading stamp redemption. The Com-

¹ See, *e.g.*, Commission counsel's proposed findings (Nos. 90-116) and briefs in support of them, *e.g.*, Complaint Counsel's Br. in Support of Proposed Findings, Conclusions, and Order 49-53), and Respondent's Exceptions to Complaint Counsel's Proposed Findings of Fact, Conclusions, and Order; and Counter Proposed Findings, pp. 33-37.

mission concerned itself with many other matters as well, including not only the injury to competition caused by S & H's practices regarding trading stamp exchanges, but also the history and structure of the trading stamp industry, the impact of trading stamps on retail competition and the scope of the remedy for violations under other counts in the complaint. In view of the position taken by S & H before the Commission it is understandable that the Commission's decision does not dwell at length on the question of unfairness to consumers. For S & H responded to complaint counsel's arguments in this regard by contending that it had valid business reasons for what it had done and that under Section 5 the Commission could not restructure the entire industry by ordering S & H to cease suppressing trading stamp exchanges in order to prevent injury to consumers (Answering Brief of Respondent to Appeal of Complaint Counsel, at pp. 41-43; see also *id.* pp. 24-40). In its opinion the Commission dealt with these arguments directly and rejected them (App. I, 172-174).

In short, the consumer unfairness issue is sufficiently articulated in the agency's findings and conclusions. The unfairness of S & H's practices to the consumer is no mere *post hoc* rationalization by appellate counsel,² but is one of the grounds considered by the Commission and leading it to the ultimate conclusion

² Contrast *Investment Co. Institute v. Camp*, 401 U.S. 617, 628; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169.

it reached. In view of the ample record (detailed in our main brief) that supports the Commission's findings and conclusions that S & H's practices were unfair to consumers, as well as injurious to competition, the reasons for the Commission's conclusion in this regard are more than apparent.

The court of appeals therefore erred in failing to consider the unfairness of S & H's practices with respect to consumers, as the dissent points out (App. III, 402-403). The Commission did not "rest its case solely on the determination that injury to a competitor exists," as the court stated (*id.* at 391). Instead the Commission found not only injury to competition but also injury to consumers and our opening brief discusses in detail why the Commission's decision should have been sustained on these grounds (Pet. Br. 27-42). We should add that, contrary to respondent's suggestion (Resp. Br. 12), the Commission does view S & H's activities in suppressing trading stamp exchanges, and in preventing retailers from exchanging S & H stamps for merchandise, as contrary to the basic policies of the antitrust laws. The attempts to eliminate the competition of "a whole class of small businessmen" (App. I, 125) that the Commission found in this record surely violated, at the very least, the underlying policy of the Sherman Act, see *United States v. General Motors Corp.*, 384 U.S. 127; *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, and could have served as a proper basis, without more, for the Commission's order. The

logically calculated to injure complainant" (161 Fed. at 221), including, for example, an attempt to induce S & H's customers to break their contract with S & H (*ibid.*). Indeed, after enumerating all of Weber's practices, the court concluded that its conduct was "no mere competitive course of action," but seemed "to fall little short of malicious, and may be said to constitute a clear case of unfair competition" (161 Fed. at 222). Given the context of congressional debate, it is clear that *Weber* was cited simply for this proposition: that it is an unfair method of competition to interfere maliciously with the business of another for the purpose of destroying that business (see 51 Cong. Rec. 14929-14930). There are of course no allegations that this is the type of conduct S & H has moved to suppress. In sum, this is not a case where the Commission has prevented S & H from taking action against activities that Congress considered unfair methods of of competition in 1914.

III. THE EVIDENCE RELIED ON BY THE COMMISSION

The remaining question is whether there is "warrant in the record" (*Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367) for the Commission to have entered an order against S&H on the basis of a combination of injury to competition and unfairness to consumers. We have already reviewed portions of the substantial evidentiary record supporting the Commission's order (Pet. Br. 5-11, 27-31). Here, we reply to respondent's claims regarding its view of the record.

a. In arguing that S&H's practices included in Count III of the complaint were not unfair acts and practices within the meaning of Section 5, respondent seeks to establish that these practices constituted excusable self-defense against activities that, unless checked, would severely injure S&H's business. Relying principally on the testimony of its officers, respondent quotes the examiner's footnote that he "was impressed with the candor of respondent's officials and with their experience" (App. I, 80, n. 14; Resp. Br. 27, n. 12)⁴ and the lower court's statement that the examiner had the opportunity to observe the "demeanor" of these witnesses (App. III, 393, n. 6; Resp. Br. 27).

But the candor and truthfulness of these witnesses could not make up for the lack of factual support for their testimony. S & H's witnesses testified that they believed that trading stamp exchanges would necessarily divert customers from S & H's retailer-licensees; that "unrestricted" redemptions would inevitably "seriously injure" S&H, and the injury would be "irreparable"; that the effectiveness of S&H's program depends on the housewife's being obliged to visit an S&H redemption center so that, remembering the

⁴The examiner said that he would, because of the candor of respondent's officials, credit their economic predictions, despite the testimony of consumers and operators of trading stamp exchanges which was to the contrary effect. *Compare* App. I, 80, n. 14 with App. II, 491-492, 494-496, 506-507, 510, 512; App. III, 26-27, 29, 48-50, 51-52, 57-63, 65, 77-78, 80-81, 84-85, 89-90, 97, 141, 146, 171-172 (testimony as to trading stamps' influence on customers' choice of retailers and effect of use of trading stamp exchanges on same).

value of this experience, she will thereafter associate the S&H redemption center's appearance and allegedly courteous personnel and high quality goods, with S&H stamps and S&H licensee stores dispensing such stamps.

However, there was no evidence of diversion of trade from licensees as a result of trading stamp exchange operations. There was a striking lack of evidence of loss of licensees, or even complaints to S&H from licensees, because of trading stamp exchanges. There was no evidence proffered to support respondent's theory that its business will be irreparably injured unless housewives are obliged to visit and be exposed to the redemption center. There was no evidence to support the theory of respondent's expert (Resp. Br. 27) that the "circular relationship from S&H to the retailer to the consumer and back to S&H" is an "essential ingredient" of the S&H promotional scheme that must not be broken by the escape of the consumer to a trading stamp exchange or to a retailer who accepts S&H stamps for merchandise. The Commission therefore concluded, after its comprehensive review of the record, that respondent's officials had (App. I, 172)—

testified in broad generalities that harm would come to respondent's system by the indiscriminate redemption [of trading stamps]. They offered no hard facts, however, to support their assertions on the issue.

In light of respondent's assertion that the Commission erroneously rejected the testimony of these witnesses and others (Resp. Br. 28-30), we have analyzed

this testimony in detail in Appendix A, *infra*, pp. 15-24, which shows that Commission had more than adequate reasons for rejecting it.

Respondent has not shown that the Commission abused its discretion in declining to accept these economic theories as facts. We submit that respondent cannot meet this burden, on this record. It is the Commission's economic expertise—not that of the courts of appeals, or the hearing examiner,⁵ or least of all the witnesses of the corporation under investigation for violation of the Act—upon which Congress rested the administration of the Federal Trade Commission Act (*Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374; *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 720). The Commission was therefore entitled to decline to accept the economic theories of the respondent's officials (see *Cement Institute*, *supra*, at 716), and to conclude that respondent had failed to establish its affirmative defense of economic justification.⁶ *A fortiori*, the Com-

⁵ Since economic analysis and inference is the issue, rather than credibility of witnesses regarding matters of historical fact, the doctrine of *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, is not apposite here.

⁶ Compare *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211, where the court held that a contract restraint may be affirmatively defended by showing that it is ancillary to and necessary to the achievement of the lawful main purpose of the contract, that the duration and scope of the restraint is not substantially greater than is necessary to achieve that purpose, and that the restraint is otherwise reasonable in the circumstances. See App. I, 174; *White Motor Co. v. United States*, 372 U.S. 253, 270 (Brennan, J., concurring).

mission was not obliged to agree with respondent's further economic judgment, based on these rejected theories, that the dangers of trading stamp exchanges to S&H "more than outweigh" the injury to the public of allowing S&H to suppress such exchanges (Resp. Br. 37).⁷

b. Respondent's assertion that "the uncontroverted evidence of record" establishes that consumers do not pay for trading stamps in the form of higher prices for goods (Resp. Br. 36) ignores its own exhibit, RX 24, which unequivocally states that the effect of trading stamps in stamp-saturated areas⁸ has been to increase food retailing mark-ups by the cost of trading stamps. Moreover, consumers do not receive "full value" for this weekly tax on groceries. Those consumers who give or throw away their trading stamps because they cannot consolidate them receive no value.⁹

⁷ Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45(c)) provides that the findings of the Commission, if supported by evidence, shall be conclusive. See also Administrative Procedure Act, § 10(e) (5 U.S.C. 706).

⁸ Such markets are common and include many of the major cities in the country (see App. I, 110-111, 152; RX 1012; RX 936). Accord, National Commission on Food Marketing, *Organization and Competition in Food Retailing*, Tech. Study No. 7, pp. 457, 462 (1966).

⁹ App. II, 316-317; App. III, 61, 91. See also App. III, 9-11 (servicemen going overseas have no use for trading stamps and want to sell them for cash).

The present value of the 156 billion S&H stamps that have not been redeemed is \$390 million (Pet. Br. 6). Respondent concedes, and operates its business on the premise, that 5 percent of all its stamps (about \$140 million out of the \$390 million) are thrown away or otherwise never redeemed (App. I, 109, 139-140).

Those who own no car and cannot get to the redemption center receive no value.¹⁰ Those with little use for the gift items S&H distributes, or who do not need them as much as they need other goods or services that S&H does not furnish, do not receive "full value" for what they have paid, when they must spend parts of their limited incomes on something S&H determines they should nonetheless buy. The unfairness to consumers of S&H's practice of suppressing trading stamp exchanges and unauthorized redemption is obvious: customers are deprived of access to the only alternatives to S&H's compulsory redirection of substantial amounts of consumer spending along the lines S&H has selected to maximize its own economic gain.¹¹

¹⁰ S&H allows mail redemption only to those customers who live more than 25 miles from an S&H redemption center (Tr. 4929, CX 402, CX 403, CX 586). The customers of the witnesses Freeman and Caplan thus could redeem their stamps neither by mail nor in person (App. III, 208-209, 238-239).

¹¹ Respondent seeks to contrast the alleged mere "inconvenience" to the public of its practices with conduct which is "foul," "vicious," "fraudulent," "dishonest," or "which shock[s] the universal conscience of mankind" (Resp. Br. 17), in order to justify the conclusion that Section 5 does not reach the conduct involved here. Similarly respondent urges (Resp. Br. 21) that its conduct is, comparatively, less obnoxious than that condemned in *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304. We think it unnecessary to make a comparative moral assessment of the practices of the respondents in that case and this. In the government's view, Congress has left a considerable middle ground to the Commission's jurisdiction, between mere "inconvenience" and foul, vicious, shocking conduct (cf. *Federal Trade Commission v. Motion Picture Adv. Co.*, 344 U.S. 392, 396).

Respectfully submitted.

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NOVEMBER 1971.

APPENDIX A

ANALYSIS OF TESTIMONY ON EFFECT OF TRADING STAMP EXCHANGES

Respondent relies upon the testimony of nine witnesses to support its prediction that "serious damage would be visited upon S&H" as a result of the operations of trading stamp exchanges or of retailers who exchange their goods for S&H stamps (Resp. Br. 27). In support of this prediction, respondent urges two subsidiary propositions: (1) such exchanges and redemption operations will cause consumers to divert their trade from S&H retailer-licensees to other retailers; (2) such operations will interfere with some "relationship between the consumer and the redemption center," by relieving the consumer of the obligation to visit S&H's redemption center and be exposed to (and thereafter remember) them and S&H's redemption merchandise (Resp. Br. 26, 27).

The record does not support these propositions. The factual data in the record points in the contrary direction. Those record passages on which respondent seeks to rely reflect speculative assertions that lack foundation. In several instances, the same witness' opinions, on direct and cross-examination, are mutually contradictory. In several instances the record shows that the witness did not intend the remarks attributed to him in the way respondent has construed

them. In no instance is there any factual support shown for these opinions, legal and economic theories, and predictions of future harm.

1. *Lee*. Respondent seeks to rely on the testimony of Stewart Lee, an economist called by Commission counsel as a witness on the effects on consumers and competition of S&H's alleged practices. Lee did not, contrary to the impression respondent seeks to create (Resp. Br. 27), testify concerning injury to S&H or its licensees as a result of the operations of trading stamp exchanges or competitive redemption. Examination of respondent's record citations shows that Lee was asked merely whether he thought, when a housewife exchanged a book of stamps for credit against the purchase of a religious picture and the book of stamps was thereafter sold to a trading stamp exchange operator \$1.50, that the retail licensees of S&H would be "getting the full measure of value for the promotional services" sold by S&H. Lee answered this convoluted question, "No" (App. III, 277).

Lee did not testify, as respondent represents, that "unrestricted trafficking in S&H stamps would be injurious to S&H and its licensees" (Resp. Br. 27); he expressly denied this. Asked for his opinion about the effect of trading stamp exchanges on S&H and its licensees, he stated that it is "imperceptible." Lee was then asked what would be the impact on S&H and its licensees of the removal of S&H's present restrictions on redemption or transfer of trading stamps; he stated

that there would be "a very minor, imperceptible impact" (App. III, 292-293).

Respondent quotes out of context, and incompletely, an alleged statement by Lee that it "would be reasonable" for S&H to impose the restrictions involved in this case (Resp. Br. 28). Counsel for respondent asked Lee whether he would not agree that "there was a reasonable basis from the company's point of view for conducting their business in that fashion," in view of the advantages to S&H resulting from use of the restrictions (App. III, 276). Lee answered, "It would be reasonable to have this restraint, I think, yes" (*ibid.*). At this point in the Appendix, the remainder of Lee's cross-examination is replaced by asterisks. Respondent fails to draw the attention of the Court to the pertinent colloquy which followed. Respondent's counsel went on to ask Dr. Lee what he meant when he said "it would be reasonable." Lee answered that he merely was recognizing that "the company wants to do that which is going to be most profitable to it, and therefore that is what I meant" (Tr. 4172). On redirect examination Lee further clarified the sense in which he used "reasonable." He testified that, as he used the term it would be "reasonable" for a firm to seek to maximize profits by engaging in price-fixing or other trade restraints (Tr. 4271-72). In short Lee did not testify, as respondent suggests, that the restrictions involved in this case are reasonable restraints within the protection of the "rule of reason"; his actual testimony was only that S&H was a rational business

concern trying to make high profits by using these restrictive practices.¹²

2. *Rossi*. Respondent relies heavily upon the direct testimony of Frank P. Rossi, a director of the company and its senior executive vice president. Rossi stated that it was his opinion that trading stamp exchanges had a "harmful" impact on the S&H promotional system. The testimony upon which respondent relies (App. III, 314) was that if the consumer could go elsewhere than to the store of an S&H licensee to buy or exchange stamps, then "obviously" the objective of the S&H program would be "defeated and the merchant no longer has the kind of promotion program that he has paid for. It no longer is a hard-hitting promotion program because it is watered down by this ability to acquire stamps in some other way."

On cross-examination, Rossi was asked whether there had been any effect on specific S&H licensees resulting from the activities of trading stamp exchange operators who had testified during the hearings before the Commission. Rossi admitted that he was not aware of any complaints from the S&H licensees in those areas (App. III, 317-318).¹³ When

¹² Moreover, it should be noted that the other quotations respondent attributes to Lee (Resp. Br. 28) do not represent the testimony of the witness Lee, but the language used by counsel for respondent, in questioning Lee.

¹³ The area involved was the south central United States. Respondent's claim that it could not prove injury to its operations resulting from trading stamp exchanges (Resp. Br. 30), allegedly on the ground that "S&H's business was protected from injury by trading stamp exchanges in that geographic area" by court injunctions (Resp. Br. 31), ignores the record

then asked whether he knew of a single complaint ever received by S&H from a housewife who patronized a trading stamp exchange, or from a licensee because of the operations of a trading stamp exchange, Rossi said he had no such knowledge (App. III, 320).¹⁴

3. *Beem*. Respondent relies on the testimony of its vice president, Eugene R. Beem, an economist. Beem testified that consumers who take their S&H stamps to an exchange, to swap them for another brand, thereby avoid the S&H redemption center and cause S&H to "lose the plus impact on those savers of an experience in the Sperry and Hutchinson redemption centers" (App. III, 356). According to Beem, the "plus impact" experience of exposure to the redemption center was critical to the S&H program (App. III, 356-357):

I think from the research that we have done that the most positive single thing that ever happened to any Sperry and Hutchinson saver is the experience of going into the redemption center and eventually effecting the redemption. In fact, there are some of our people who say

testimony of unenjoined trading stamp exchange operators in Fort Worth, Texas (App. III, 149), Corpus Christi, Texas (App. II, 463), and Tulsa, Oklahoma (App. III, 99).

¹⁴Rossi's admissions on cross-examination parallel the testimony of Walter A. Whitnack, another S&H executive vice president, who was in charge of S&H's sales operations (App. II, 438). Whitnack was asked whether he had ever received any complaints from an S&H licensee about unauthorized redemption or a trading stamp exchange; he had not. He also testified that he knew of no licensees that S&H had ever lost "because they were mad about" these practices (App. II, 442-443).

that you really cannot talk about a stamp saver until the saver has been into the Sperry and Hutchinson redemption center. It is terribly critical to us, in my judgment, to keep that ingredient which requires the saver of the Sperry and Hutchinson stamps to have that experience of going to the center and the exchange destroys it.

Beem also stated that going to an exchange, rather than a redemption center, would cause S&H to lose the benefit of "the factor of the remembrance value" (App. III, 356-357).

Beem did not offer a single survey or study to support his claims about the "redemption experience." No witness testified about having the experience or feeling its "plus impact." Beem did not rely on any studies or other evidence of the remembrance value of S&H's merchandise or the redemption experience. This omission is explained by Rossi's testimony that no such studies had ever been made (Tr. 5190-91).

4. *Phillips*. Respondent also relies on the opinion testimony of Charles Phillips, an S&H director (App. III, 384-385):

It is in my judgment based upon that thought and consideration that if you break the relationship between the consumer and the redemption center, you have broken an essential ingredient of this system. This is in a sense the payoff. This is where she gets the quality of merchandise. This is where she gets the merchandise of the visual nature which is in her

home. And these ingredients I consider essential and the loss of them would break the flow and the system.

Phillips offered no studies or surveys that provided support for this opinion, nor any first-hand or even hearsay accounts of incidents or discussions with consumers or S&H licensees that had led him to this conclusion. No consumer (or anyone but respondent's officials) testified in this proceeding that there existed any "relationship," circular or otherwise, between the consumer and the S&H redemption center, and no empirical evidence of any kind was offered to establish its existence—let alone to establish what would happen to S&H if something were to "break the flow" of it.

Nor is there any evidence in the record that trading stamp exchanges will "break the flow" of the redemption relationship. The only evidence is that trading stamp exchanges *increase* the flow of redemption, by enabling consumers to consolidate diverse stamp holdings and to secure the value of trading stamps that they would otherwise throw away *-(e.g., App. III, 61, 91).*

5. *Lewis.* Morris Lewis, an S&H retailer-licensee, testified that, in his opinion, trading stamp exchanges have a "detrimental effect" upon S&H licensees. On cross-examination, Lewis admitted that he had never had any experience with trading stamp exchanges (App. III, 324); that he did not know where a single trading stamp exchange was located (*ibid.*); and that

he had never complained to S&H about the operations of any trading stamp exchange (App. III, 325-326).

6. *McDonald*. Frank McDonald was the only S&H licensee, or other S&H witness, who had ever had any competitive experience with the exchange of trading stamps.¹⁵ McDonald could not recall, however, when the incident took place (App. III, 372-373). And he admitted on cross-examination that he did not know whether a single customer of his had obtained any S&H stamps through the exchange program; he could not name a single customer that he had lost as a result of it; and he did not know of any customer who had shopped any less at one of his supermarkets because of it (App. III, 374-375).

7. *Rance*. Respondent misstates and truncates the testimony of Morris Rance, a trading stamp exchange operator called by Commission counsel. In the same colloquy as that on which respondent relies. (Resp. Br. 28), Rance stated that he did not think that his trading stamp exchange had diverted any patronage from S&H licensees, because the use of trading stamp exchanges did not change housewives' shopping habits (App. III, 176). He testified, also, that he knew of no instance where one of his customers had stopped trading with any S&H licensee after using his exchange (App. III, 171-172).¹⁶

¹⁵ S&H did not call as witnesses any of its retailer-licensees from the areas in which the trading stamp exchange operators who testified before the Commission did business.

¹⁶ This testimony is consistent with the entire consumer testimony in the record. Every consumer witness in this proceeding who was asked whether the use of trading stamp exchanges

8. *Caplan*. Morris Caplan, an S&H licensee who owned a general merchandise store in a small mill town (Ellicott City, Maryland), was called as a witness by Commission counsel. Caplan testified that he had accepted S&H stamps from his customers for partial credit on work shoes, inexpensive clothing, infants wear, and other "necessities * * * that they could not get at the S&H redemption centers" (App. III, 218-223), until respondent had required him to stop this practice (App. II, 488-489; App. III, 217). Respondent quotes (Resp. Br. 29) the language of its counsel and not Caplan, in putting a hypothetical question concerning a hypothetical non-existent "Murphy's" redemption or exchange operation. On redirect examination, Caplan testified that he thought that a trading stamp exchange would not "affect our business one way or the other" (App. III, 253; see also App. III, 257).

9. *Freeman*. Nelson Freeman was another S&H licensee operating a small-town department store, whom respondent prohibited from accepting S&H stamps in payment for his merchandise (App. III, 202-208). Respondent relies on Freeman's response to a question from respondent's counsel about customers' redeeming their S&H stamps at a hypothetical "Murphy's" (App. III, 210):

Q. What I am asking you is, if you paid out the good money for those stamps, do you think

affected her shopping habits or patterns answered in the negative (App. II, 494-496, 506-507, 512; App. III, 52, 65, 78, 84-85, 97, 146).

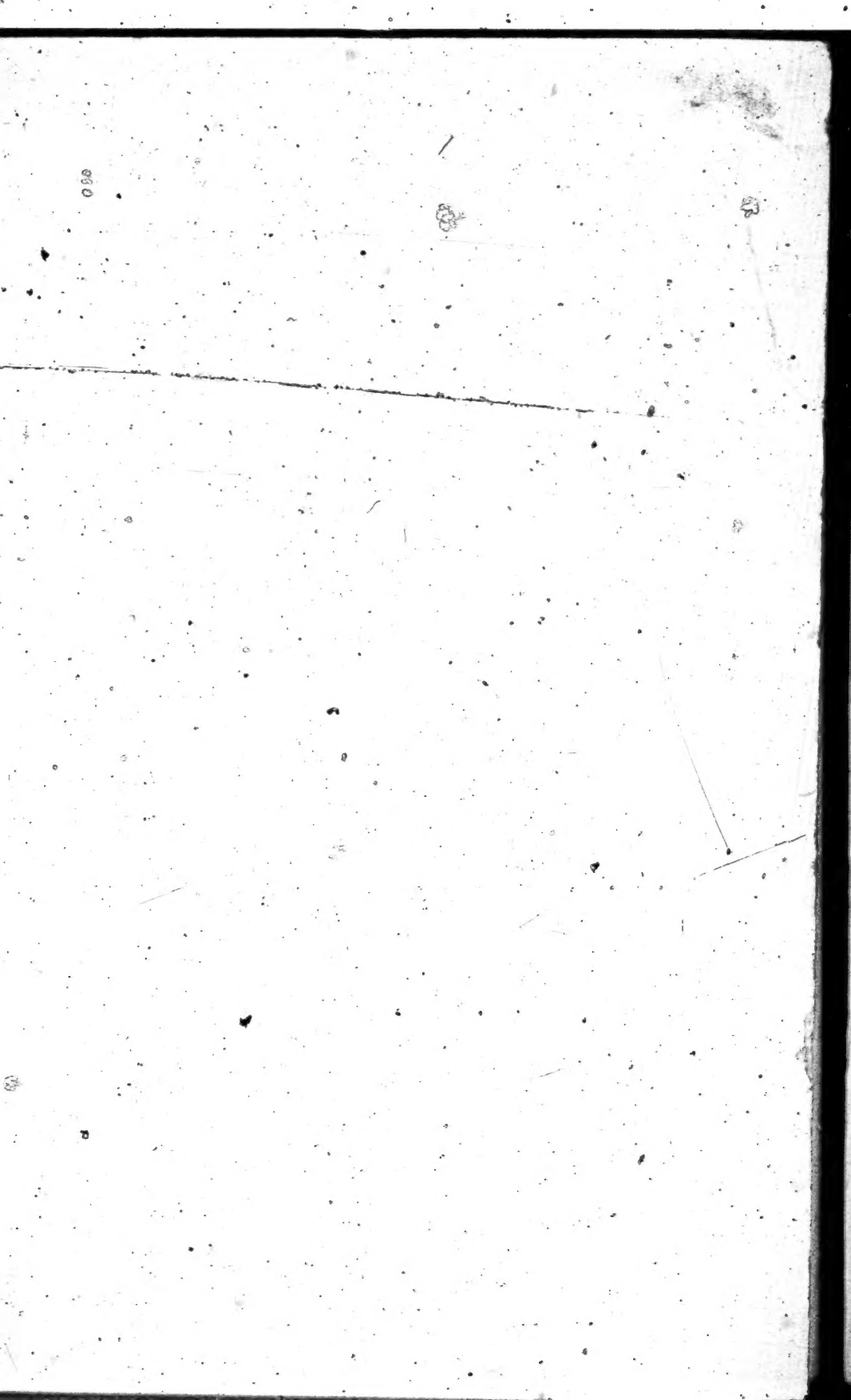
the S&H service is worth very much to you if a housewife can take the stamps instead to Murphy's?

A. No, I wouldn't think it would be.

On redirect examination, Freeman testified that it would *not* harm his business for one of his customers to go to the hypothetical Murphy's, because his customers would buy certain things at Murphy's store and other things at his store. Upon recross-examination by respondent's counsel, regarding the effect on his business of his customers' dealing with the hypothetical Murphy's, Freeman finally said, "You are asking a question that is in the air" (App. III, 212). When pressed for an answer he said that he saw nothing wrong with the transaction (App. III, 213), and he added that he thought his customers should have the privilege of redeeming the stamps wherever they wanted to (*ibid.*).

* * * * *

Taking the record as a whole, the Commission found that it did not support the predictions of harm made by S&H. We believe the Commission's rejection of respondent's economic theories would readily pass muster if a *de novo* evaluation of the record were made. But that, of course, is not the appropriate legal standard. The question is whether the record contains substantial evidence supporting the agency's views; measured by that standard, the Commission's order should be enforced.



Syllabus

FEDERAL TRADE COMMISSION v. SPERRY & HUTCHINSON CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70-70. Argued November 15, 1971—Decided March 1, 1972

The Federal Trade Commission (FTC) entered a cease-and-desist order against Sperry & Hutchinson Co. (S&H), the largest and oldest trading stamp company, on the ground that it unfairly attempted to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps. S&H argued in the Court of Appeals that its conduct was beyond the reach of § 5 of the Federal Trade Commission Act, which it claimed permitted the FTC to restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals. The Court of Appeals reversed the FTC, holding that the FTC had not demonstrated that S&H's conduct violated § 5 because it had not shown that the conduct contravened either the letter or the spirit of the antitrust laws. *Held*:

1. The Court of Appeals erred in its construction of § 5. Congress, as previously recognized by this Court, see *FTC v. R. F. Keppel & Bro.*, 291 U. S. 304, defines the powers of the FTC to protect consumers as well as competitors and authorizes it to determine whether challenged practices, though posing no threat to competition within the letter or spirit of the antitrust laws, are nevertheless either unfair methods of competition, or unfair or deceptive acts or practices. The Wheeler-Lea Act of 1938 reaffirms this broad congressional mandate. Pp. 239-244.

2. Nonetheless the FTC's order cannot be sustained. The FTC does not challenge the Court of Appeals' holding that S&H's conduct violates neither the letter nor the spirit of the antitrust laws and its opinion is barren of any attempt to rest its order on the unfairness of particular competitive practices or on considerations of consumer interests. Nor did the FTC articulate any standards by which such alternative assessments might be made. Pp. 245-249.

3. The judgment of the Court of Appeals setting aside the FTC's order is affirmed, but because that court erred in its construction of § 5, its judgment is modified to the extent that the case is remanded with instructions to return it to the FTC for

Opinion of the Court

405 U. S.

further proceedings not inconsistent with this opinion. Pp. 249-250.

432 F. 2d 146, modified and remanded.

WHITE, J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

Assistant Attorney General McLaren argued the cause for petitioner. With him on the briefs were Solicitor General Griswold, Harold D. Rhynedance, Jr., Karl H. Buschmann, and Richard H. Stern.

Harold L. Russell argued the cause for respondent. With him on the brief were Samuel K. Abrams, Claus Motulsky, J. Sam Winters, Alan R. Wentzel, and Wayne T. Elliott.

MR. JUSTICE WHITE delivered the opinion of the Court.

In June 1968 the Federal Trade Commission held that the largest and oldest company in the trading stamp industry,¹ Sperry & Hutchinson (S&H), was violating § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (a)(1), in three respects. The Commission found that S&H improperly regulated the maximum rate at which trading stamps were dispensed by its retail licensees; that it combined with others to regulate the rate of stamp dispensation throughout the industry; and that it attempted (almost invariably successfully) to suppress the operation of trading stamp exchanges, and other "free and open" redemption of stamps. The Commission entered cease-and-desist orders accordingly.

¹ On the nature of the industry, see generally Comment, Trading Stamps, 37 N. Y. U. L. Rev. 1090 (1962). The Commission proceedings in the instant case are discussed in Comment, The Attack on Trading Stamps—An Expanded Use of Section 5 of the Federal Trade Commission Act, 57 Geo. L. J. 1082 (1969).

S&H appealed only the third of these orders. Before the Court of Appeals for the Fifth Circuit it conceded that it acted as the Commission found, but argued that its conduct is beyond the reach of § 5 of the Act. That section provides, in pertinent part, that:

"The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U. S. C. § 45 (a)(6).

As S&H sees it, § 5 empowers the Commission to restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals. In S&H's view, its practice of successfully prosecuting stamp exchanges in state and federal courts cannot be restrained under any of these theories.

The Court of Appeals for the Fifth Circuit agreed and reversed the Commission, Judge Wisdom dissenting. 432 F. 2d 146 (1970). In the lower court's view:

"To be the type of practice that the Commission has the power to declare 'unfair' the act complained of must fall within one of the following types of violations: (1) a per se violation of anti-trust policy; (2) a violation of the letter of either the Sherman, Clayton, or Robinson-Patman Acts; or (3) a violation of the spirit of these Acts as recognized by the Supreme Court of the United States." *Id.*, at 150 (footnote omitted).

Holding that the FTC had not demonstrated that S&H's conduct violated either the letter or the spirit of the antitrust laws, the Court of Appeals vacated the Commission's order.

The FTC petitioned for review in this Court. We granted certiorari to determine the questions presented in the petition. 401 U. S. 992 (1971).

I

The Challenged Conduct

S&H has been issuing trading stamps—small pieces of gummed paper about the size of postage stamps—since 1896. In 1964, the year from which data in this litigation are derived, the company had about 40% of the business in an industry that annually issued 400 billion stamps to more than 200,000 retail establishments for distribution in connection with retail sales of some 40 billion dollars. In 1964, more than 60% of all American consumers saved S&H Green Stamps.

In the normal course, the trading stamp business operates as follows. S&H sells its stamps to retailers, primarily to supermarkets and gas stations, at a cost of about \$2.65 per 1200 stamps; retailers give the stamps to consumers (typically at a rate of one for each 10¢ worth of purchases) as a bonus for their patronage; consumers paste the stamps in books of 1,200 and exchange the books for "gifts" at any of 850 S&H Redemption Centers maintained around the country. Each book typically buys between \$2.86 and \$3.31 worth of merchandise depending on the location of the redemption center and type of goods purchased. Since its development of this cycle 75 years ago, S&H has sold over one trillion stamps and redeemed approximately 86% of them.

A cluster of factors relevant to this litigation tends to disrupt this cycle and, in S&H's view, to threaten its business. An incomplete book has no redemption value. Even a complete book is of limited value because most "gifts" may be obtained only on submission of more than one book. For these reasons a collector of another type of stamps who has acquired a small number of green stamps may benefit by exchanging

with a green stamp collector who has opposite holdings and preferences.² Similarly, because of the seasonal usefulness or immediate utility³ of an object sought, a collector may want to buy stamps outright and thus put himself in a position to secure redemption merchandise immediately though it is "priced" beyond his current stamp holdings. Or a collector may seek to sell his stamps in order to use the resulting cash to make more basic purchases (food, shoes, etc.) than redemption centers normally provide.

Periodically over the past 70 years professional exchanges have arisen to service this demand. Motivated by the prospect of profit realizable as a result of serving as middlemen in swaps, the exchanges will sell books of S&H stamps previously acquired from consumers, or, for a fee, will give a consumer another company's stamps for S&H's or vice versa. Further, some regular merchants have offered discounts on their own goods in return for S&H stamps. Retailers do this as a means of competing with merchants in the area who issue stamps. By offering a price break in return for stamps, the redeeming merchant replaces the incentive to return to the issuing merchant (to secure more stamps so as to be able to obtain a gift at a redemption center) with the attraction of securing immediate benefit from the stamps by exchanging them for a discount at his store.³

S&H fears these activities because they are believed to reduce consumer proclivity to return to green-stamp-issuing stores and thus lower a store's incentive to buy and distribute stamps. The company attempts to pre-empt "trafficking" in its stamps by contractual pro-

² Often merchandise obtained by redemption is used as a gift.

³ The efforts of some retailers to reissue S&H stamps are not involved in this case. The FTC explicitly left S&H free to seek injunctions against reissuance. 1 App. 169.

visions reflected in a notice on the inside cover of every S&H stamp book. The notice reads:

"Neither the stamps nor the books are sold to merchants, collectors or any other persons, at all times the title thereto being expressly reserved in the Company The stamps are issued to you as evidence of cash payment to the merchants issuing the same. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any further use of them without our consent in writing. We will in every case where application is made to us give you permission to turn over your stamps to any other bona-fide collector of S&H Green . . . Stamps; but if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest that you fill the book, and personally derive the benefits and advantages of redeeming it." (Reproduced at 2 App. 230.)

S&H makes no effort to enforce this condition when consumers casually exchange stamps with each other, though reportedly some 20% of all the company's stamps change hands in this manner. But S&H vigorously moves against unauthorized commercial exchanges and redeemers. Between 1957 and 1965, by its own account the company filed for 43 injunctions against merchants who redeemed or exchanged its stamps without authorization and it sent letters threatening legal action to 140 stamp exchanges and 175 businesses that redeemed S&H stamps. In almost all instances the threat or the reality of suit forced the businessmen to abandon their unauthorized practices.

II

The Reach of Section 5

The Commission presented two questions in its petition for certiorari, the first being "[w]hether Section 5 of the Federal Trade Commission Act, which directs the Commission to prevent 'unfair methods of competition . . . and unfair or deceptive acts or practices,' is limited to conduct which violates the letter or spirit of the antitrust laws." The other issue relates to the significance of state court holdings that the practices challenged here are lawful.⁴ Neither question requests review of the Court of Appeals' decision that the business conduct proscribed by the Commission violates neither the letter nor spirit of the antitrust laws. Accordingly, we intimate no opinion on that issue and turn to the question of the reach of § 5.

In reality, the question is a double one: First, does § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history, and prior cases compel an affirmative answer to both questions.

When Congress created the Federal Trade Commission in 1914 and charted its power and responsibility

⁴ Though the Court of Appeals referred to state and federal court decisions that approved S&H's practice, our reading of its opinion leaves no doubt that it did not reverse the FTC order on the erroneous theory that such determinations might foreclose a contrary FTC § 5 decision. We therefore put aside the Government's second question as irrelevant and focus on its first contention.

under § 5, it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase "unfair methods of competition" by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply. Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914), presents the reasoning that led the Senate Committee to avoid the temptations of precision when framing the Trade Commission Act:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."

The House Conference Report was no less explicit. "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task." H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914). See also Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Acad. Pol. Sci. Proc. 666, 667 (1926); Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Re-definition*, 7 Vill. L. Rev. 517 (1962).

Since the sweep and flexibility of this approach were thus made crystal clear, there have twice been judicial attempts to fence in the grounds upon which the FTC might rest a finding of unfairness. In *FTC v. Gratz*, 253 U. S. 421 (1920), the Court over the strong dissent of Mr. Justice Brandeis (who had been involved in drafting the Trade Commission Act), wrote that while the "exact meaning" of the phrase "unfair method of competition" . . . is in dispute," the only practices that were subject to this characterization were those that were "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Id.*, at 427. This view was reiterated in other opinions over the next decade. See, e. g., *FTC v. Curtis Publishing Co.*, 260 U. S. 568 (1923), and *FTC v. Sinclair Refining Co.*, 261 U. S. 463, 475-476 (1923). The opinion of the Court of Appeals' majority, citing *Sinclair* in support of its narrow view of the FTC's leeway, is in the tradition of these authorities.

In *FTC v. Raladam Co.*, 283 U. S. 643 (1931), a unanimous Court held that: "The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree Unfair trade methods are not *per se* unfair methods of competition." (Italics in original.) "It is obvious," the Court continued,

"that the word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be,

lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. . . . If broader powers be desirable they must be conferred by Congress." *Id.*, at 647-649.

Neither of these limiting interpretations survives to buttress the Court of Appeals' view of the instant case. Even if the first line of cases, *Gratz* and its progeny, stood unimpaired, their deference to action taken to constrain "deception, bad faith, fraud or oppression" would grant the FTC greater power to set right what it perceives as wrong than the panel of the Court of Appeals acknowledges. But frequent opportunity for reconsideration has consistently and emphatically led this Court to the view that the perspective of *Gratz* is too confined. As we recently unanimously observed: "Later cases of this Court . . . have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair." *FTC v. Brown Shoe Co.*, 384 U. S. 316, 320-321 (1966).

The leading case that recognized a role for the FTC beyond that mapped out in *Gratz*, *FTC v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934), also brought *Raladam* into question; on both counts it sets the standard by which the range of FTC jurisdiction is to be measured today. Keppel & Brothers sold penny candies in "break and take" packs, a form of merchandising that induced children to buy lesser amounts of concededly inferior candy in the hope of by luck hitting on bonus packs containing extra candy and prizes. The FTC issued a cease-and-desist order under § 5 on the theory that the popular marketing scheme con-

travened public policy insofar as it tempted children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children.

The Court had no difficulty in sustaining the FTC's conclusion that the practice was "unfair," though any competitor could maintain his position simply by adopting the challenged practice. "[H]ere," the Court said, "the competitive method is shown to exploit consumers, children, who are unable to protect themselves [I]t is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy." *Id.*, at 313.

En route to this result the Court met Keppel's arguments that absent an antitrust violation or at least incipient injury to competitors, *Gratz* and *Raladam* so straitjacketed the FTC that the Commission could not issue a cease-and-desist order proscribing even an immoral practice. It held:

"Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation." *Id.*, at 310.

Henceforth, unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce to be confined to purely competitive behavior.

The perspective of *Keppel*, displacing that of *Raladam*, was legislatively confirmed when Congress adopted the 1938 Wheeler-Lea amendment, 52 Stat. 111, to § 5. The amendment added the phrase "unfair or deceptive acts or practices" to the section's original ban on "unfair methods of competition" and thus made it clear that Congress, through § 5, charged the FTC with protecting consumers as well as competitors. The House Report on the amendment summarized congressional thinking: "[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H. R. Rep. No. 1613, 75th Cong., 1st Sess., 3 (1937). See also S. Rep. No. 1705, 74th Cong., 2d Sess., 2-3 (1936).

Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the anti-trust laws.⁵

⁵ The Commission has described the factors it considers in determining whether a practice that is neither in violation of the anti-trust laws nor deceptive is nonetheless unfair:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law,

III

The general conclusion just enunciated requires us to hold that the Court of Appeals erred in its construction of § 5 of the Federal Trade Commission Act. Ordinarily we would simply reverse the judgment of the Court of Appeals insofar as it limited the unfair practices proscribed by § 5 to those contrary to the letter and spirit of the antitrust laws and we would remand the case for consideration of whether the challenged practices, though posing no threat to competition within the precepts of the antitrust laws, are nevertheless either (1) unfair methods of competition or (2) unfair or deceptive acts or practices.

What we deem to be proper concerns about the interaction of administrative agencies and the courts, however, counsels another course in this case. In this Court the Commission argues that however correct the Court of Appeals may be in holding the challenged S&H practices beyond the reach of the letter or spirit of the antitrust laws, the Court of Appeals nevertheless

statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).” Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed. Reg. 8355 (1964).

S&H argues that a later portion of this statement commits the FTC to the view that misconduct in respect of the third of these criteria is not subject to constraint as “unfair” absent a concomitant showing of misconduct according to the first or second of these criteria. But all the FTC said in the statement referred to was that “[t]he wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others.” *Ibid.* (emphasis added).

erred in asserting that the FTC could measure and ban conduct only according to such narrow criteria. Proceeding from this premise, with which we agree, the Commission's major submission is that its order is sustainable as a proper exercise of its power to proscribe practices unfair to consumers. Its minor position is that it also properly found S&H's practices to be unfair competitive methods apart from their propriety under the antitrust laws.

The difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order. "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Institute v. Camp*, 401 U. S. 617, 628 (1971). We cannot read the FTC opinion on which the challenged order rests as premised on anything other than the classic antitrust rationale of restraint of trade and injury to competition.

The Commission urges reversal of the Court of Appeals and approval of its own order because, in its words, "[t]he Act gives the Commission comprehensive power to prevent trade practices which are deceptive or unfair to consumers, regardless of whether they also are anticompetitive." Brief for the FTC 15. It says the Court of Appeals was "wrong in two ways: you can have an anticompetitive impact that is not a violation of the antitrust laws and violate Section 5. You can also have an impact upon consumers without regard to competition and you can uphold a Section 5 violation on that ground." Tr. of Oral Arg. 18. Though completely accurate, these statements cannot be squared with the Commission's holding that "[i]t is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an

impairment of competition," Opinion of Commission, 1 App. 175; its conclusion that "[r]espondent . . . prevents . . . competitive reaction[s] and thereby it has restrained trade. We believe this is an unfair method of competition and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act and so hold," 1 App. 178; its observation that:

"Respondent's individual acts and its acts with others taken to suppress trading stamp exchanges and other stamp redemption activity are all part of a clearly defined restrictive policy pursued by the respondent. In the circumstances surrounding this particular practice it is difficult to wholly separate the individual acts from the collective acts for the purpose of making an analysis of the consequences under the antitrust laws." 1 App. 179;

and like statements throughout the opinion, see, *e. g.*, 1 App. 176-178, *passim*.

There is no indication in the Commission's opinion that it found S&H's conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws.* For its part, the

* The Commission did explicitly decline to assess S&H's conduct in light of one leading antitrust case. In *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, 379 (1967), this Court held that: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor [v. United States]*, 372 U. S. 253 (1963); *Dr. Miles [Medical Co. v. Park & Sons Co.]*, 220 U. S. 373 (1911). Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale."

Arguably S&H's practice is proscribed by this doctrine. When the FTC declined to rely on this precedent, however, it did so not

theory that the FTC's decision is derived from its concern for consumers finds support in only one line of the Commission's opinion. The Commission's observation that S&H's conduct limited "stamp collecting consumers' . . . freedom of choice in the disposition of trading stamps," 1 App. 176, will not alone support a conclusion that the FTC has found S&H guilty of unfair practices because of damage to consumers.

Arguably, the Commission's findings, in contrast to its opinion, go beyond concern with competition and address themselves to noncompetitive and consumer injury as well. It may also be that such findings would have evidentiary support in the record. But even if the findings were considered to be adequate foundation for an opinion and order resting on unfair consequences to consumer interests, they still fail to sustain the Commission action; for the Commission has not rendered an opinion which, by the route suggested, links its findings and its conclusions. The opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.

to turn to considerations other than those embedded in the anti-trust laws, but instead to look for considerations less "technical" and more deeply rooted in antitrust policy:

"We do not believe it appropriate to decide the broad competitive questions presented in this record on the narrow and technical basis of a restraint on alienation. The circumstances here are much different from that where products are transferred to a dealer for resale. They are complicated by the nature of the trading stamp scheme. It is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition. Thus, we intend to look at the substance of the allegedly illegal practice rather than to decide the case by application of a technical formula." 1 App. 175-176.

Our view is that "the considerations urged here in support of the Commission's order were not those upon which its action was based." *SEC v. Chenery Corp.*, 318 U. S. 80, 92 (1943). At the least the Commission has failed to "articulate any rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U. S. 156, 168 (1962).

The Commission's action being flawed in this respect, we cannot sustain its order. "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Chenery, supra*, at 94. *Burlington Truck Lines, supra*, at 169. A court cannot label a practice "unfair" under 15 U. S. C. § 45 (a)(1). It can only affirm or vacate an agency's judgment to that effect. "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Chenery, supra*, at 88. And as was repeated on other occasions:

"For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 197), the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' 332 U. S., at 196." *Burlington Truck Lines, supra*, at 169.

In these circumstances, because the Court of Appeals' judgment that S&H's practices did not violate either the letter or the spirit of the antitrust laws was not attacked and remains undisturbed here, and because the Commis-

sion's order could not properly be sustained on other grounds, the judgment of the Court of Appeals setting aside the Commission's order is affirmed. The Court of Appeals erred, however, in its construction of § 5; had it entertained the proper view of the reach of the section, the preferable course would have been to remand the case to the Commission for further proceedings. *Chenery, supra*, at 95; *Burlington, supra*, at 174; *FPC v. United Gas Pipe Line Co.*, 393 U. S. 71 (1968). Accordingly, the judgment of the Court of Appeals is modified to this extent and the case is remanded to the Court of Appeals with instructions to remand it to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate.

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

